In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Kansas City Area Transportation Authority, prays that a writ of certiorari be issued to review the decision in this case of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The unreported opinion of the United States District Court for the Western District of Missouri is reprinted at Appendix pp. A1-A24, *infra*. The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 99 LRRM 2408, as corrected by unreported amendments dated September 21, 1978, is reprinted at Appendix pp. A25-A40, *infra*.

JURISDICTION

The Opinion of the Court of Appeals was handed down and judgment was entered on August 21, 1978, and, on September 21, 1978, the Court of Appeals denied a timely petition for rehearing and suggestions for rehearing en banc. Apdx. A41, A42. Mandate was stayed on October 4, 1978, for an initial period of thirty days, pending the filing of this petition.

This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether there is Federal Question jurisdiction and an implied Federal cause of action over transit union claims of breach of contract by a local public body, simply because the contract was entered into for the purpose of receiving Federal subsidies, pursuant to Sec. 13(c) of the Urban Mass Transportation Act, when no Federal statute confers jurisdiction, no Federal Question presented by plaintiff was decided below, and the construction and validity of agreements between local transit unions and local public bodies is basically the concern of the States.

2. Whether the Opinion below is in conflict with controlling and sound opinions of this Court and the Courts of Appeal, setting forth conditions for implication of a Federal cause of action, and rejecting Federal Question jurisdiction, when (a) the controversy does not center on any dispute respecting the validity, construction or effect of any Federal law, (b) no resolution of any Federal Question is essential to the success or failure of the claim of plaintiff transit union, and (c) the new contract arbitration provision in controversy was not mandated by Federal law.

3. Whether the Opinion below erroneously declares important doctrines of Federal labor law, in construing an agreement in favor of compulsory arbitration of new labor contracts, and invoking the rule that Federal labor policy favors arbitration, when the Labor Board and Courts of Appeal have ruled that there is no Federal labor policy favoring arbitration of new labor contracts.

4. Whether the Opinion below erroneously decides important issues of Federal law, applicable to defenses of local transit authorities throughout the country, in ruling that the acceptance of Federal funds estops such public authorities from denying their statutory or common law power to delegate to a private arbitrator the making of new labor contracts for their employees, when (a) the Federal funding agency and the union complaining of breach of contract have expressly agreed in standardized contracts that local transit authorities remain subject to all existing legal limitations, including Federal, State and local law, and (b) a Congressional intent to override other laws is not supported by statutory language or legislative history.

STATUTES INVOLVED

Petitioner questions the applicability of the following general grant of jurisdiction:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity. 28 U.S.C. Sec. 1331(a); 90 Stat. 2721.

No other statutory provisions were directly involved in the Opinion below. Pertinent to the background of the controversy are (1) Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. Sec. 1609(c); 78 Stat. 307 (Apdx. A44) and (2) the collective bargaining authorization of an amendment to the bi-state compact creating Kansas City Area Transportation Authority, Sec. 238.100, RSMo; K.S.A. Sec. 12-2534; 82 Stat. 338 (Apdx. A45).

STATEMENT OF THE CASE

The Opinion below affirms a District Court order which would require Kansas City Area Transportation Authority (the Authority), a public body providing local transit service in Missouri and Kansas, to submit to arbitration the making of a new contract between the Authority and plaintiff (the Union), the bargaining representative of its employees.

The Union contends that compulsory arbitration of new contract terms ("interest arbitration") is provided by one term of certain agreements between the parties made in 1968 and 1973. The provision in question was included in these so-called "13(c) agreements" (named for Section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. Sec. 1609(c)) in order to obtain Federal capital grants. Section 13(c) requires "protective arrangements" to prevent harm to employees who may be affected by the Federal grants.

The first Federal grant, in 1969, enabled the Authority to purchase the assets of privately-owned transit companies serving the Kansas City area; the second grant was for a headquarters building.

The Authority contended below that the interest arbitration provision of the 13(c) agreements, like all prior

and subsequent collective bargaining agreements between the parties, allows either party to serve a notice of termination, which results in the expiration of the interest arbitration option. The Authority further contends that it has no statutory or common law power to delegate the final making of a new labor contract to a private arbitrator.

In the absence of a provision of the Urban Mass Transportation Act or any other statute creating Federal Court jurisdiction over 13(c) agreements, the Authority contends that no Federal cause of action may be implied, and no Federal Question jurisdiction exists.

The Court below acknowledged that most Federal District Courts have held that "subject matter jurisdiction does not exist". Apdx. A31. Although acknowledging some doubt (Apdx. A35), the Court affirmed the District Court's ruling, accepting jurisdiction.[1]

The Opinion of the Court below construes the 13(c) agreement to provide compulsory arbitration of new contracts, apparently relying on "the federal policy in favor of arbitration as a means of settling labor disputes". Apdx. A39.

In response to the Authority's contention of "impermissible delegation of power", the Court below stated,

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1. The identical jurisdictional question is now pending in a union appeal under submission since June, 1978, in the First Circuit (*Local Div. No. 714, Amalgamated Transit Union* v. *Greater Portland Transit District*, No. 78-1077). The same question is pending in another union appeal not yet argued in the Sixth Circuit (*Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, No. 78-1185). On October 19, 1978, in an unreported decision the Court of Appeals for the Seventh Circuit, in *Local Div. 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981, ruled the jurisdictional issue consistently with the decisions below. In still another 1978 decision, where the parties had agreed on a contract pending litigation, and the case was declared moot, the jurisdictional issue presented by the union appeal was referred to as "without question, a thorny one." *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority*, 578 F.2d 29, 34 (2d Cir. 1978).

without citation of authority, that the acceptance of Federal funds makes the obligation to arbitrate "binding on the agency, regardless of general state law or policy". Apdx. A40. The 13(c) agreement, however, in widely-used language supplied by the International Union, provides that "In the event any provision of this agreement is held to be invalid or otherwise unenforceable under the Federal, State or local law, such provision shall be renegotiated", reserving the right of either party to "invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements". Apdx. 36, 234 (Record below). The 1969 Federal grant contract contains a similar provision: "Anything in the Grant Contract to the contrary notwithstanding, nothing in the Grant Contract shall require the Public Body to (take any action) in contravention of any applicable State or territorial law..." Apdx. 64 (Record below).

REASONS FOR GRANTING THE WRIT

Important labor law issues and a patently erroneous estoppel of the Authority from complying with local law (and with Federal law pertaining to the authority of a bi-state agency) are presented by Questions 3 and 4 of this petition. These substantive issues alone could have significant nationwide impact, especially in the local transit industry, where similar agreements abound. There are hundreds of such agreements with local public bodies, throughout the country. Many of these agencies, like the petitioner, are already experiencing operating deficits exceeding $10 million annually, largely attributable to labor costs. It is the petitioner's view that arbitration of new contracts, in which the decision-maker lacks budgetary responsibility, is one major cause of rising deficits.

As a matter of jurisdiction, an additional compelling need for review is presented by burgeoning litigation throughout the country, relating to Questions 1 and 2, where transit unions are asserting claims to Federal jurisdiction and a Federal cause of action based on so-called "13(c) agreements". The Opinion below, accepting jurisdiction, represented a concededly minority view when written, and serious "diversity of view in the lower courts" persists. See *Curtis* v. *Loether*, 415 U.S. 189, 191 (1974).

At an earlier stage of this litigation, the Union soundly advised the Court of Appeals that the issues presented in this case have truly "national importance".

With respect to the four questions presented, we combine consideration of the first two questions, and offer the following more particular reasons for this Court to grant the writ:

Questions 1 and 2. Section 13(c) of the Urban Mass Transportation Act requires local public bodies, as a condition for receiving Federal grants, to make protective arrangements so that Federal funding will not prove harmful to employee interests. 49 U.S.C. Sec. 1609(c); Apdx. A44. One purpose of the section was to preserve collective bargaining rights; it has been correctly ruled, however, that the statute does not require an "enhancement" of any union rights, such as would occur if a system of voluntary arbitration of new contract provisions were to be converted into a mandatory system, at the election of either party. *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority*, 556 F.2d 659, 662 (2d Cir. 1977).[2]

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2. Protection of the status quo, as to employee benefits, was a minor theme in the legislation as a whole; the main purpose

(*Continued on following page*)

While the statute expressly contemplates arrangements between the Federal funding agency and a local grantee, a practice has arisen under which "13(c) agreements" have been negotiated and executed between unions and the local public body.

There is no Federal statute, similar to the familiar statute pertaining to collective bargaining agreements of private employers (29 U.S.C. Sec. 185), creating Federal jurisdiction to construe or enforce 13(c) agreements between unions and local public bodies. When efforts have been attempted to invoke Federal jurisdiction, the Federal District Courts have almost always ruled that there is no Federal Question jurisdiction, and no other basis for invoking Federal jurisdiction. Claims of breach of provisions in 13(c) agreements are to be litigated in the State Courts, according to District Judges Gignoux (Maine), Wellford (Tennessee), Henderson (Georgia), Port (New York) and Bratcher (Kentucky), as cited in footnote 2 of the Opinion below. Apdx. A31-A32.[3]

Footnote continued—

was to provide Federal subsidies to save local transit operations, and permit increased service to meet public needs. Apdx. A27; 49 U.S.C. Secs. 1601 and 1602(a)(2). To the extent Section 13(c) may be construed to enhance union rights, contrary to its intent (as stated by the Second Circuit) and subsidies are eaten up in labor costs, the result so achieved frustrates the main objective of the legislation.

3. The only reported opinion so holding, in this rapidly developing area of litigation, is that of Judge Wellford, *Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, 447 F.Supp. 88 (W.D. Tenn. 1977). The unreported authorities are cited in footnote 8, 447 F.Supp. at 94. The Wellford ruling is on appeal to the Sixth Circuit and the unreported Gignoux ruling has been under advisement in the First Circuit since June, as noted in footnote 1 of this petition. See also the one reported opinion consistent with the opinions below, *Local Div. 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, 445 F. Supp. 798 (W.D. Wisc. 1978), affirmed October 19, 1978, in an unreported decision.

The Federal funding statute did not require union agreements with public bodies, but was a cause of the development and execution of the type of agreement here in question. It may be assumed arguendo that some of the provisions of a typical 13(c) agreement could conceivably be considered mandated by Federal law, as protective arrangements in grant contracts. No Federal court has ruled, however, that arbitration of new contract provisions is *mandated* by Federal law, in the absence of similar prior requirements in collective bargaining agreements. The Union erroneously asserts that such an enhancement of union rights is mandated, presumably to bootstrap itself into Federal jurisdiction. In any event, however, the statutory contention is not "an essential one" in the plaintiff's claim, does not spell the difference between victory and defeat, and is therefore insufficient to invoke Federal Question jurisdiction, under Justice Cardozo's landmark opinion in *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936). Unless the above Cardozo-formulated limitations on Federal Question jurisdiction are strictly observed, and only controversies which are basically Federal are subject to Federal jurisdiction, "we shall be lost in a maze". 299 U.S. at 118.

See also an earlier ruling of this Court that a suit does not arise under Federal law "unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912).

In considering jurisdiction over agreements which have been submitted to Federal agencies for approval as to contents, Judge Friendly has held that there is no Federal Question jurisdiction unless the *specific* provision in litigation is *mandated* by Federal law. *McFaddin Express,*

Inc. v. *Adley Corp.*, 346 F.2d 424, 426-7 (2d Cir. 1965), *cert. den.*, 381 U.S. 915 (1966). In light of the 1977 *Division 580* case, *supra*, and supporting legislative history, it cannot be legitimately contended that new contract arbitration is so mandated, certainly in the absence of a prior history of compulsory interest arbitration clauses (which is not claimed here).

As part of the jurisdictional defect, the absence of an implied Federal cause of action demonstrates that the Union has chosen the wrong court, under the principles of *Cort* v. *Ash*, 422 U.S. 66 (1975). Nothing could be more clearly a matter of primarily local concern than the labor relations of a local public body, and the meaning and validity of agreements entered into by such bodies. See *M.B. Guran Co., Inc.* v. *City of Akron*, 546 F.2d 201, 205 (6th Cir. 1976) holding that contracting procedures of local public bodies are "peculiarly a matter of concern to the state" even though a Federal assistance agreement in that case required an award to the lowest bidder (l.c. 203).

However viewed, the Opinion below, accepting Federal jurisdiction, is contrary to principled rulings of this Court and of the Courts of Appeal, and is an unsound departure from many Federal Court rulings on the specific, widely-litigated issue of jurisdiction over "13(c) agreements".[4]

Avoidance of further disruption of the collective bargaining processes in the local transit industry (and of confusion as to where controversies should be decided)

4. If review is sought in the companion *LaCrosse* case, *supra*, note 1, petitioner would also seek to present issues pertaining to the amount in controversy, which are somewhat obscured in the Opinion below, but are clearly presented in the unreported Seventh Circuit opinion. The issue ruled by the Seventh Circuit pertains to the Union's "economic interest in a new . . . contract apart from that of the members' interest". Opinion, page 17, in 77-1891 (7th Cir. 1978).

requires review by the Court, and reversal of the decision below.

Question 3. The Opinion below construes the 13(c) agreement language in question in favor of compulsory interest arbitration, even though the arbitration provision itself refers to an overriding right to take economic measures upon "expiration" of a collective bargaining agreement. Apdx. A38. The Court acknowledged that the collective bargaining agreements of the parties (before and after the 13(c) agreements) have uniformly allowed notices of termination, "under which either side could have avoided interest arbitration". Apdx. A7, A36. The Court's construction of the 13(c) agreement language to achieve a different result, in favor of compulsory interest arbitration, is explicable only if the courts were under some obligation to resolve all contract language uncertainty in favor of arbitration.

The Opinion acknowledges that it relies on the familiar "federal policy in favor of (grievance) arbitration". Apdx A39. The Opinion has patently confused grievance arbitration (to keep labor peace under existing contracts) with interest arbitration (using an arbitrator as a *substitute for the collective bargaining processes* to arrive at new contract terms). The latter practice, as Justice Black once noted in a railroad context, is generally "bitterly opposed" by unions and management alike, and should obviously not be considered a Federally-favored general practice. *Detroit & Toledo Shore Line R. Co.* v. *United Transportation Union*, 396 U.S. 142, 148 (1969).[5]

5. Contrary to the Opinion of the Court of Appeals, Apdx. A39, we do not contend that interest arbitration agreements "will not be enforced by the courts". Rather, we have expressly stated, as the District Court noted, that " 'if private parties have unambiguously agreed to arbitration of new contrary terms, the agreement is normally enforceable' ". Apdx. A18.

The National Labor Relations Board has recently made clear that interest arbitration is not a favorite of the law, and that its relationship to grievance arbitration is confined to the fact that they "both have the terminology of arbitration." Decision of Administrative Law Judge in *Columbus Printing Pressmen & Assistants Union No. 252*, 219 NLRB 268, 280 (1975); enforced in *NLRB* v. *Columbus Printing Pressmen, etc.*, 543 F.2d 1161 (5th Cir. 1976). That case holds that grievance arbitration is a mandatory subject of bargaining but that interest or new contract arbitration is permissive only, and cannot be pressed to impasse.

The Second Circuit ruled, earlier this year, that "an interest arbitration provision of a collective bargaining agreement is void as contrary to public policy, insofar as it applies to nonmandatory subjects". *NLRB* v. *Sheet Metal Workers Int. Ass'n, Local Union No. 38*, 575 F.2d 394 (2d Cir. 1978). That decision holds that parties cannot become "locked" into such interest arbitration, as a means of resolving future labor conditions, at the end of all future contract periods. It is now established (except in the Eighth Circuit) that Federal labor policy generally favors collective bargaining rather than arbitration as a means of establishing wages and labor conditions.[6]

The Opinion of the Court, construing the 13(c) agreements in favor of compulsory interest arbitration, under a supposed Federal policy favoring such arbitration (but

6. In the context of the transit system funding legislation here in question, not one word of Congressional debate suggests a policy in favor of interest arbitration; and in hearings leading to the legislation, Secretary of Labor Wirtz testified that it would *not* be "a step toward compulsory arbitration", which the Secretary stated, "I oppose very strongly". Hearings on H.R. 3881, Committee on Banking and Currency, House of Representatives, 88th Congress, 480-1 (1963).

contrary to co-existing collective bargaining agreements) was in conflict with sound authority, establishes false principles which will have a pernicious effect in labor relations, particularly in construing local transit company 13(c) agreements, and should be reviewed and reversed.

Question 4. The Authority contends that it has no power, as a public body, to delegate to a private arbitrator the final authority to make a new labor contract for its employees, thereby losing control of 75% of its annual expenses. The Federal government's first experiment with interest arbitration was in the postal legislation of 1970, six years after the legislation in question. 39 U.S.C. Sec. 1207.[7] Some states have authorized such arbitration for public employees, by statute. It has never been claimed in any other litigation that a public body, absent statutory authority, can abdicate a statutory duty to establish wages of public employees, or the duty to bargain with employees when such duty is imposed by statute. The statutes here allow collective bargaining, leading to substantive agreements as to employee wages and other employment conditions, as consented to by the Authority, but do *not* authorize interest arbitration. Sec. 238.100, RSMo; K.S.A. Sec. 12-2534; 82 Stat. 338. Apdx. A45.

No authority has been cited by the Union, or by either of the Courts below, which would empower the Authority to bind itself in advance to arbitration of new contract terms. Instead, the Court below ruled (Apdx. A40) that the obligation to arbitrate is binding because the Authority

7. Insofar as there is any Federal policy regarding methods of resolving new contract impasses in the local transit industry, this Court decided, at the request of this Union, that public policy allows strikes. *Division 1287, Amalgamated Transit Union* v. *State of Missouri*, 374 U.S. 74 (1963).

accepted Federal funds, "regardless of general state law or policy."[8]

The theory that a local public body is estopped from future compliance with the limitations on its statutory power is novel and unsupported; moreover, the Union and the Federal funding agency have expressly provided by contract that the Authority shall remain bound by all applicable law, Federal, state or local, *the provisions of the 13(c) agreement notwithstanding.* Page 6, *supra*, Apdx. 36, 64, 234 (Record below).

There is nothing in the subsidizing legislation which shows an intent to override local law. Senator Morse, the leading spokesman for the protective labor amendment, stated, for example, "The amendment does not supersede any State policy." 109 Cong. Rec. 5673 (April 4, 1963). See also 109 Cong. Rec. 5421-4, statements of Senators Harrison Williams, Javits and Sparkman, all noting a purpose to avoid overriding local law. The 13(c) agreements and funding agency contracts, expressly subordinating the agreements to local law, are thus properly designed to carry out the legislative intent to avoid preemption.

The Opinion below, estopping the Authority from adhering to legal principles against delegation of authority, is an unwarranted construction Federalizing labor relations in the local transit industry, and should be reviewed and reversed.

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8. State law and Federal law are similar, in holding that grants of power will not be loosely inferred, but "must be indicated by express terms or by clear implication." *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358, note 7 (9th Cir. 1977), cert. gr., June 5, 1978 in No. 77-1327.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1, 1978

APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0840-CV-W-1

DIVISION 1287, AMALGAMATED
TRANSIT UNION, AFL-CIO,
Plaintiff,

vs.

KANSAS CITY AREA TRANSPORTATION
AUTHORITY,
Defendant.

MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed February 28, 1978)

I.

This is an action to compel arbitration of a labor dispute brought by Division 1287, Amalgamated Transit Union, AFL-CIO (hereinafter "Union"), against the Kansas City Area Transportation Authority (hereinafter "KCATA"). Under the agreed expedited pretrial and trial procedures, which have been complied with by counsel in an exemplary manner, the Court is able to rule defendant KCATA's motion to dismiss the Union's first amended

complaint and the merits of the Union's prayer for a permanent injunction at the same time. We find and conclude that defendant KCATA's motion to dismiss should be denied and that the Union is entiteld to appropriate relief on the merits.

II.

KCATA's motion to dismiss is grounded primarily upon this Court's alleged "lack of jurisdiction over the subject matter." That motion is also based upon additional grounds which are defenses on the merits requiring consideration of matters outside the complaint.* *Gully* v. *First National Bank,* 299 U.S. 109, 113 (1936), and its progeny require that the question of whether "the matter in controversy . . . arises under . . . the laws of the United States" within the meaning of 28 U.S.C. § 1331(a), must be determined by looking solely to the allegations of the complaint. Therefore, we will defer discussion of the non-jurisdictional grounds of the motion to dismiss until we reach the merits.

We find and conclude that we have jurisdiction over the subject matter of this suit, basing our conclusion on the opinion of the Honorable James E. Doyle in *Local Division 519, Amalgamated Transit Union* v. *The La Crosse Municipal Transit Utility and The City of La Crosse, Wisconsin,* No. 77-C-292 (W.D. Wis., Jan. 27, 1978). Judge Doyle, facing the precise jurisdictional question presented in this case, found that he had jurisdiction to consider the merits of the Union's claim. We expressly adopt his reasoning by reference.

The Court recognizes the division of authority among the district courts which have considered the jurisdictional

*For example, KCATA's claim that "the contract sued upon, fairly construed, does not provide for mandatory interest arbitration."

issue presented in this case.** We agree with Judge Doyle's discussion of the cases which have reached a contrary conclusion. The courts which have denied federal jurisdiction did not have the benefit of Judge Doyle's carefully reasoned opinion.

Nor did they have the benefit of the order entered by the Court of Appeals for the Seventh Circuit on February 14, 1978, in connection with the appeal pending in the *La Crosse* case. The Seventh Circuit, after finding that the defendant-appellants had failed to establish appropriate grounds to warrant a stay of the preliminary injunction, stated that "the defendants-appellants must now proceed to arbitration" and ordered that "defendant-appellants' MOTION FOR STAY PENDING APPEAL is hereby DENIED."

We therefore reject the jurisdictional ground upon which defendant KCATA's motion to dismiss is based by our acceptance and application of the principles stated in *La Crosse.* The findings of fact and conclusions of law made on the merits are dispositive of the remainder of the grounds stated in KCATA's motion to dismiss.

III.

The parties in this case were afforded a full and fair opportunity to adduce any and all evidence which either side deemed relevant and material. Following agreed pro-

**See, e.g., *Local No. 714, Amalgamated Transit Union* v. *Greater Portland Transit Dist.*, No. 77-54-SD (D. Maine, Jan. 11, 1978). Defendant KCATA also relies upon, e.g., *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transp. Auth.*, No. 77-CV-45 (N.D. N.Y. Dec. 19, 1977) appeal pending; *Metropolitan Atlanta Rapid Transit Auth.* v. *Local Division No. 732, Amalgamated Transit Union,* No. 18492 (N.D. Ga. July 11, 1973); *Local Division 1285* v. *Jackson Transit Auth.*, No. C-76-104-E (W.D. Tenn. Dec. 23, 1977).

cedures, they then submitted proposed findings of facts and thereafter stated in a later filing whether they admitted or denied the proposed findings submitted by the other party.

As the massive stipulations of fact executed by the parties demonstrate, there are few, if any, substantial disputes in regard to any of the factual circumstances of this case. The parties do disagree, of course, concerning whether particular undisputed factual circumstances are relevant and material, but those disputes present questions of law rather than questions of fact.

The only areas of possible factual dispute would be those created by the testimony of the witnesses in regard to the meaning of the collective bargaining agreements negotiated by the parties. Both parties, however, objected and continue to object to oral testimony which would attempt to vary the plain meaning of the arbitration clause in the contracts entered into by the parties. As our findings of fact demonstrate, we have concluded that the objections of both sides to such testimony, based on the parol evidence rule, are well taken and that we have not considered the testimony of any witness called by either side in support of any finding of fact as it may relate to the plain meaning of the arbitration clauses in the agreements involved in this case.

There is no necessity to resolve any apparent conflict in the testimony in regard to jurisdictional amount as it may relate to the individual employees. We need find only that such testimony is insufficient to establish "to a legal certainty" that the required $10,000 is not in controversy. *See St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-89 (1938), most recently applied in *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 346 (1977). We find, however, that more than $10,000

is in controversy in regard to the Union's interest and under the other undisputed factual circumstances of this case. In short, we agree with what Judge Doyle ruled in regard to the jurisdictional amount question presented in *La Crosse*.

Similarly, plaintiff's proposed findings concerning policies which the Union allegedly has followed since the enactment of the Urban Mass Transportation Act in 1964 or how those policies allegedly may have been specifically implemented in Erie, Pennsylvania, and Broome County, New York, are not relevant. We refuse to make the findings proposed by the plaintiff in that regard.

Defendant has requested that we make detailed findings concerning a wage study made by a KCATA official, the status of the parties' negotiations toward a new collective bargaining agreement, and the legislative history of the Urban Mass Transportation Act (UMTA). We refuse to make any of those proposed findings.

Although we have consistently urged the parties to continue their negotiations at the bargaining table, the Court does not have power or jurisdiction to make a finding of fact which would tend to justify the bargaining position taken by either KCATA or the Union. While we do not believe it is necessary to make any findings of fact in regard to the legislative history of the Act, we agree with and adopt Judge Doyle's analysis of the legislative history of the Act as stated in his *La Crosse* opinion.

Pursuant to Fed. R. Civ. Pro. 52(a), we make the following findings of fact in language proposed by counsel for either the Union or KCATA and which opposing counsel have admitted in their respective briefs to be accurate.

IV. FINDINGS OF FACT

1. Plaintiff, Division 1287, Amalgamated Transit Union, is an unincorporated labor organization representing workers in the transit industry for the purposes of collective bargaining. [Court Exhibit 1, which is the Stipulation of Facts between the parties (hereinafter "Ct. Exh. 1") ¶1].

2. Leroy Kent is the current President of the Union and has served as President at all times relevant to this litigation. [Ct. Exh. 1, ¶1].

3. Defendant Kansas City Area Transportation Authority is a creation of an interstate compact and statutes adopted by the States of Kansas and Missouri and approved by Congress. [Ct. Exh. 1, ¶2].

4. KCATA operates a public transit system in the counties of Cass, Clay, Jackson, and Platte in Missouri and the counties of Johnson, Leavenworth, and Wyandotte in Kansas. [Ct. Exh. 1, ¶2].

5. L. C. Huffman is the Resident Manager of KCATA. [Ct. Exh. 1, ¶2].

6. The proposed budget of KCATA for 1978 is as set forth in Exhibit "A" of Court Exhibit 1. [Ct. Exh. 1, ¶2 and Exhibit "A"].

7. On December 29, 1977, announcement was made that a federal grant of $5.2 million had been approved for operating expenses in 1977, payable to local communities which had advanced such funds during the year. [Ct. Ex. 1, ¶2].

8. Five hundred eight-two (582) persons employed by KCATA are members of and represented for purposes of collective bargaining by the Union. [Ct. Exh. 1, ¶3].

9. At all times since the creation of KCATA, the Union has been recognized by KCATA as the collective bargaining agency for a unit of employees consisting of certain but not all of its employees. [Ct. Exh. 1, ¶4].

10. Prior to the establishment of KCATA, transit service in the area now serviced by KCATA was provided by Kansas City Transit, Inc., (earlier named Kansas City Public Service Company), a privately owned and operated company. [Ct. Exh. 1, ¶5].

11. From 1943 to 1968, employees of Kansas City Transit, Inc., were represented by the Union for purposes of collective bargaining. [Ct. Exh. 1, ¶5].

12. Kansas City Transit, Inc., and its employees were subject to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, including the provisions of § 7 of the Act, 29 U.S.C. § 157. [Ct. Exh. 1, ¶5].

13. Throughout this time, employee wages and employment conditions were governed by collective bargaining agreements negotiated by the Union leadership and the management of the system. [Ct. Exh. 1, ¶5].

14. The collective bargaining agreements contained a no-strike clause applicable to the contract period and provided a procedure whereby, if the contract was not terminated by one of the parties or if termination notices were withdrawn, both parties might agree to extend the agreement during bargaining and to resolve any remaining disputed new contract terms by submission to a panel of arbitrators for final and binding resolution of the disputed new contract terms ("interest arbitration"). [Ct. Exh. 1, ¶5].

15. During 1967, KCATA applied for a capital grant from the federal Urban Mass Transportation Administra-

tion under the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.* (hereinafter UMTA) to purchase the assets and services of the Kansas City Transit Company and nine smaller companies. [Ct. Exh. 1, ¶6].

16. Accordingly, the legislatures of Missouri and Kansas were considering amendments to the bi-state compact legislation that created the Authority. [Ct. Exh. 3, ¶5(a)-(d)].

17. During the legislative consideration of the Amendments, the International Union presented its proposals for new compact legislation through Earle W. Putnam, General Counsel of the Union since 1965. [Ct. Exh. 3, ¶5(a)-(d); Exhibits I, J, K-L].

18. The Union proposed that the legislative amendments to the compact legislation include a provision obliging KCATA to offer new contract arbitration in case of impasse in bargaining [Ct. Exh. 3, Exhibits I and J], but the Union agreed to withdraw its requests when representatives of the Authority represented that it would be politically unfeasible to obtain arbitration through legislation. [Ct. Exh. 3, Exhibits K & L].

19. The Authority did not state to the Union any substantive opposition to mandatory interest arbitration. [Ct. Exh. 3, Exhibit L].

20. Prior to September 30, 1968, General Counsel Putnam sent KCATA a draft of a proposed agreement under § 13(c) of UMTA (hereinafter the § 13(c) agreement). [Ct. Exh. 2, Exhibit C1].

21. Paragraph 4 of the first Putnam draft of a proposed § 13(c) agreement contains provisions relating to arbitration and, in the last proposed paragragh, to expiration of collective bargaining agreements. [Ct. Exh. 2, Exhibit C-1].

22. The first three paragraphs of Paragraph 4 of the first Putnam draft of the proposed § 13(c) agreement contain provisions relating in part to the arbitration of new contract terms. [Ct. Exh. 2, Exhibit C-1].

23. Section 9 of the collective bargaining agreement in effect in September, 1968, contains provisions relating to the arbitration of new contract terms. [Ct. Exh. 2, top document (unlettered)].

24. Section 9 of the last printed collective bargaining agreement between KCATA and the Union, executed March 21, 1974, contains provisions relating to the arbitration of new contract terms. [Ct. Exh. 3, Exhibit N].

25. The last proposed paragraph in paragraph 4 of the first Putnam draft (hereinafter referred to as the "Expiration Provision"), provides as follows: "Nothing in this paragraph shall be construed to enlarge or limit the right of either party to utilize, upon the expiration of any collective bargaining agreement, any economic measures that are not inconsistent with or in conflict with applicable law. [Ct. Exh. 2, Exh. C-1].

26. Section 4 of the collective bargaining agreement between KCATA and the Union, in effect in September, 1968, contained provisions for the termination of the agreement (unnumbered first paragraph) or for proposing changes in the agreement (unnumbered second paragraph). [Ct. Exh. 2, top document (unlettered)].

27. The aforesaid termination provision (as of 1968) provided that "all of the rights, privileges, duties and obligations hereunder of the respective parties hereto . . . shall cease and terminate at one moment before midnight on said October 31st, subject to full and faithful performance by each party of the agreements herein contained on its part to be performed up to and including such date." [Ct. Exh. 2, top document (unlettered)].

28. The aforesaid change provision (as of 1968) provided that where a notice of termination has not been given or has been withdrawn, changes may be made by agreement, "with final resort to arbitration as hereinafter provided . . . if that is necessary." [Ct. Exh. 2, top document (unlettered)].

29. P. S. Jenison, the Chief Executive Officer of KCATA, examined the draft and sent a memorandum to William Icenogle, Executive Director of KCATA, opining that mandatory interest arbitration might be a good idea, but his only concern was that the Union should waive any right to strike during an arbitration. [Ct. Exh. 2, Exhibits A1 & B1].

30. On September 30, 1968, P. S. Jenison submitted to William Icenogle comments on the proposed § 13(c) agreement submitted by the Union (first Putnam draft). [Ct. Exh. 2, Exhibit A1].

31. Commenting on paragraph 4 of the first Putnam draft, Jenison stated that "it might be a desirable policy for the Authority to establish compulsory arbitration after all reasonable efforts to negotiate an agreement have failed." [Ct. Exh. 2, Exhibit B1].

32. Commenting on paragraph 4 of the first Putnam draft, Jenison stated, "the third arbitrator should be from the 7-county area" and made additional procedural suggestions for such arbitration. [Ct. Exh. 2, Exhibit B1].

33. Commenting on paragraph 4 of the first Putnam draft, Jenison stated, "with the arbitration procedure prescribed, there should be, contemporaneously, the no-strike pledge." [Ct. Exhibit 2, Exh. B1].

34. The expiration provision of the first Putnam draft, in permitting "any economic measures that are not inconsistent with or in conflict with applicable law," referred to strikes. [Ct. Exh. 2, Exhibit C1].

35. The expiration provision of the first Putnam draft was checked for exclusion and marked "out" by someone at KCATA. [Ct. Exh. 2, Exh. C1, Exhibit 3, ¶4].

36. KCATA negotiators responded to the first Putnam draft with an unsigned KCATA draft. [Ct. Exh. 3, ¶4; Ct. Exh. 2, Exhibit Z].

37. The unsigned KCATA draft deleted the expiration provision of the first Putnam draft and also contained an express no-strike provision relating to the period of any arbitration that may occur. [Ct. Exh. 2, Exhibit Z, ¶4].

38. The first Putnam draft and the unsigned KCATA draft were reviewed and discussed in a meeting at the offices of the International Union in Washington, D.C. in October, 1968. [Ct. Exh. 1, ¶11A].

39. Attending the Washington conference were Union representatives Putnam, McCaffrey, and Kent.

40. Attending the Washington conference were KCATA representatives Icenogle, Barcus and Kansas City Transit, Inc., representatives Jenison and Lockwood.

41. The § 13(c) agreement, dated November 18, 1968, was approved and signed by KCATA and the Union [Ct. Exh. 1, Exhibit C].

42. The final 1968 § 13(c) agreement provides:

> In the case of any labor dispute where collective bargaining does not result in agreement after all reasonable efforts to agree in good faith, the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons as hereinafter provided, one to be chosen by the Au-

thority, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the findings of the majority of said board of arbitration shall be final and binding on the parties thereof; all contract conditions shall remain undisturbed and there shall be no lockouts, strikes, walkouts or interference with or interruption of service during the arbitration proceedings. . . .

The term "labor dispute" shall be broadly construed and shall include any controversy concerning wages, salaries, worknig conditions or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintenance of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustments of grievances, any claim, difference, or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project.

Nothing in this paragraph (4) shall be construed to enlarge or limit the right of either party to utilize, upon the expiration of any collective bargaining agreement, any economic measures that are not inconsistent or in conflict with applicable law.

[Ct. Exh. 1, ¶8].

43. The 1968 § 13(c) agreement thereafter was certified by the Secretary of Labor. [Ct. Exh. 1, Exhibit D].

44. On January 10, 1969, KCATA and the United States of America entered into a capital grant contract of assistance for Project No. INT-UIG-6. The contract provided federal grants to KCATA for purposes of acquiring the capital assets of ten companies in the Kansas City area transportation district. [Ct. Exh. 1, ¶9 and Exhibit D].

45. In February, 1969, KCATA took over the transit company operations and the employees became employees of KCATA. [Ct. Exh. 1, ¶10].

46. Since 1969, KCATA has also made repeated applications for funds under the UMTA. [Ct. Exh. 1, ¶11].

47. In 1972 the Union agreed twice to extend the terms of the 1968 § 13(c) agreement to other capital grants. Under those conditions, the Secretary of Labor certified that the Project met the requirements of § 13(c) of the UMTA. [Ct. Exh. 1, ¶11(a)].

48. In 1973 KCATA applied for a grant under UMTA to purchase a consolidated transit center. In April, 1973, the Union and KCATA concluded a new § 13(c) agreement. *Inter alia,* Paragraph 17 of the 1973 § 13(c) agreement contains language identical to the language of Paragraph 4 of the 1968 § 13(c) agreement. [Ct. Exh. 1, ¶11 (b)].

49. In 1974 the Union agreed to extend the terms of the 1973 § 13(c) agreement to another capital grant. Under those conditions, the Secretary of Labor certified that the Project met the requirements of § 13(c) of the UMTA. [Ct. Exh. 1, ¶11(c)].

50. The National § 13(c) agreement was concluded between the Union and the American Public Transit Association in 1975. It applies only to operating grants.

51. In 1976 the KCATA applied for two grants for operating assistance under the UMTA. In both instances, the Union agreed to abide by the provisions of a uniform national § 13(c) agreement. In both instances, the Union's letter of agreement included the following statement:

It is understood and agreed that Local Union 1287's endorsement is not a waiver of its right under paragraph (17) of the April 24, 1973 § 13(c) agreement between the parties. The agreement of April 24, 1973 will remain in full force and effect, and paragraph (17) thereof will be included in the Addendum to the national agreement pursuant to paragraph (4) thereof.

[Ct. Exh. 1, ¶11(d)].

52. In March, 1977, the Union agreed to extend the provisions of the 1973 § 13(c) agreement, including the provision of Paragraph 17, to another capital grant. [Ct. Exh. 7, ¶11(e)].

53. As recently as September, 1977, the Union agreed to extend the provisions of the 1973 § 13(c) agreement, including the provision of Paragraph 17 to another capital grant. [Ct. Exh. 1, ¶11(f)].

54. In 1974 KCATA executed a grant contract with the United States for Project IT-03-0024 in the amount of $7,761,850. [Ct. Exh. 2, Exhibit U].

55. The grant contract contained the following clause:

Sec. 5. *Labor Protection*—The Public Body agrees to undertake, carry out, and complete the Project under the terms and conditions determined by the Secretary of Labor to be fair and equitable to protect the interests of employees affected by the Project and meeting the requirements of Section 13 (c) of the Act.

These terms and conditions are specified in the letter of certification to the government from the Department of Labor dated April 2, 1974, which is incorporated herein by reference.

The Public Body and the Amalgamated Transit Union executed an agreement, dated April 24, 1973, which provides to members of the Union protections satisfying the requirements of Section 13(c) of the Act in connection with a Project to finance the construction of a terminal center and the purchase of related equipment.

Accordingly,

a. The terms and conditions of the agreement executed April 24, 1973, shall be applicable to the instant Project;

b. The term "Project" as used in the contract of April 24, 1973, shall be deemed to cover and refer to the Project presently pending; and

c. Employees of the Authority, other than those represented by the Union, and employees of any other urban mass transportation carrier in the service area of the Project shall be afforded substantially the same levels of protection as are afforded to Union members under the April 24, 1973, agreement.

[Ct. Exh. 2, Exhibit U].

56. From 1969 to the present, the parties have resolved their collective bargaining for a new collective bargaining agreement through bargaining once, and twice through new contract arbitration, but never through a strike. [Ct. Exh. 1, ¶12-13].

57. On October 17, 1977, the Union presented KCATA with a demand for modification of the existing collective bargaining agreement, including requests for increased wages, pension, health insurance benefits, vacations, and sick leave.

58. In September, 1977 KCATA gave the Union a notice of termination of the prior collective bargaining agreement effective November 14, 1977. [Ct. Exh. 1, ¶15].

59. The prior collective bargaining agreement provided for a dues check-off. The present Union dues are $12 per month for 582 active employees, amounting to $83,808 per year.

60. During the negotiations, the parties were negotiating over a contract term of as much as three years.

61. We cannot find to a legal certainty that the items in dispute were not worth more than $10,000 per employee for the reasonably predictable contract period.

62. During the month of November, 1977, the Union twice requested KCATA to submit to arbitration under the § 13(c) agreement. KCATA refused. [Ct. Exh. 1, ¶¶17, 18, 19, 20, and 21].

63. Arbitration under the § 13(c) agreements may be requested by either party, without limit to the bargaining positions at the time of impasse. [Ct. Exh. 1, Exhibit C].

64. This was the first time KCATA has ever refused to go to arbitration.

65. KCATA at one time determined to make immediate unilateral changes in the terms and conditions of employment of KCATA employees as follows:

(a) the imposition of a three-day waiting period before employees in the office clerical unit may begin to use sick leave (other employees now being subject to such a three-day waiting period);

(b) a $90 per month cap or maximum on KCATA payments for hospitalization insurance;

(c) establishment of part-time classifications in the office clerical unit for new hires, consistent with the tentative agreement previously reached with the Union;

(d) elimination of the requirement that two employees be assigned to road-test buses;

(e) to require that employees work five days during a work week in order to qualify for overtime pay for work on the sixth day;

(f) elimination of the requirement that a job scheduled for Saturday and Sunday be filled during the Monday-Friday period when the regularly assigned employee is off work;

(g) to allow Fare Box Clerks to drive buses on KCATA property in order to accomplish their work, but for no other purpose;

(h) establishment of revised Extra Board rules;

(hh) institution of new mechanic trainee program; and

(i) reduction of benefit programs for employees hired after November 14, 1977, in accordance with tentative agreements previously reached with the Union:

(1) accumulation of one week's vacation after one year;

(2) change of formula for sick leave from one day per month to 1/4 day per month for the first year, 1/2 day per month for the second year, and 3/4 day per month for the third year;

and

(3) elimination of dependents' health insurance coverage during the first year and the addition

of a spouse only during the second year (not agreed to by Union).

[Ct. Exh. 3, Exhibit P].

66. All efforts to make the above proposed unilateral changes are being withheld by KCATA pending the decision of this Court.

67. On November 28, 1977, this action was filed by the Union, seeking enforcement of the UMTA, the Grant Contract, and the § 13(c) agreements as set forth above.

V. CONCLUSIONS OF LAW

In stating our conclusions of law on the merits we need not reach many of the questions which the parties have discussed in the various briefs filed in this Court. Defendant recognizes in its proposed conclusion of law No. 19 that "if pirvate parties have unambiguously agreed to arbitration of new contract terms, the agreement is normally enforceable. *Builders Association of Kansas City* v. *Greater Kansas City Laborers*, 326 F.2d 867 (8th Cir.), *cert. den.*, 377 U.S. 917 (1964)."

The arbitration clause agreed to by the parties in their § 13(c) agreements since 1968 in anticipation of obtaining millions upon millions of dollars of federal aid defines a "labor dispute" subject to arbitration as a term which:

> "shall be broadly construed and [which] shall include any controversy concerning . . . the making or maintenance of collective bargaining agreements, the terms to be included in such agreements, . . . or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees affected by the Project."

We find and conclude that the provisions of the § 13(c) agreements as they relate to the disputes subject to arbitration, when considered separately—as well as when considered in light of all other provisions of the § 13(c) agreements, and the history of the negotiations of the parties in reaching those agreements, *see Kansas City Royals Baseball Corp.* v. *Major League Baseball Players Ass'n*, 532 F.2d 615, 623 (8th Cir. 1976), *aff'g* 409 F. Supp. 233 (W.D. Mo. 1976)—are clear and unambiguous. An unambiguous clause which specifies both parties' obligation to submit all disputes relating to the making and the terms to be included in a new collective bargaining agreement to arbitration upon demand of the other party may not be altered or varied by parole evidence. *See Builders Ass'n of Kansas City* v. *Greater Kansas City Laborers*, 217 F. Supp. 1 (W.D. Mo. 1963), *aff'd*, 326 F.2d 887 (8th Cir.), *cert. den.*, 377 U.S. 917 (1964).

We do not accept defendant's proposed conclusion of law No. 26, that "the construction of the 13(c) agreements sought by the Union would be beyond the powers granted the Commissioners of KCATA, and so construed, the 13(c) agreements would be illegal." We do not believe the cases relied upon by KCATA support its legal argument or that KCATA violated the law when it participated in arbitration proceedings in the past.

Defendant KCATA attempts to develop a sharp distinction between what it calls "grievance arbitration" and "interest" or "new contract arbitration." Its proposed conclusion of law No. 14 contains a good example of the argument that KCATA has attempted to establish throughout the pending litigation. Grievance arbitration is there referred to as being "highly favored and readily accepted"; conversely, new contract arbitration is described as being "extremely controversial and generally regarded as a

'stumbling block' to collective bargaining." Defendant KCATA argued generally that agreements containing grievance arbitration provisions should be enforced but that agreements for new contract arbitration should not. We do not accept this distinction.

We concluded in the *Builders Association* case, 213 F. Supp. at 435, that the Supreme Court's Steelworkers' trilogy and other familiar cases*** had undermined the rationale of the most well-known case upholding this distinction—Judge Wyzanski's opinion in *Boston Printing Pressmen's Union* v. *Potters Press*, 141 F. Supp. 553 (D. Mass. 1956), *aff'd*, 241 F.2d 787 (1st Cir.), *cert. den.*, 355 U.S. 817 (1957). The Court of Appeals, in affirming this Court's determination of *Builders Association*, expressly rejected defendant's renewed contention in the Court of Appeals that "the dispute in suit is not arbitrable because it concerns the creation of a new agreement." The Court of Appeals concluded that *Boston Printing Pressmen's Union* v. *Potter Press*, decided "several years before the *Steelworkers* cases were decided by the Supreme Court, . . . is far too weak a peg upon which to hang a reversal of the judgment in the instant case." 326 F.2d at 870.

Furthermore, we see no rational basis for distinguishing the *Builders Association* case from this case on the factual ground that in the former only some of the new contract provisions were to be sent to arbitration, whereas in this case the parties are not in binding contractual agreement on any of the provisions of a new contract.

***See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *General Electric Co.* v. *Local 205*, 353 U.S. 547 (1957); *Goodall-Sanford* v. *United Textile Workers*, 353 U.S. 550 (1957); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Judge Sobeloff in *Winston-Salem Printing Press. & A.U.* v. *Piedmont Pub. Co.*, 493 F.2d 221 (4th Cir. 1968), expressly rejected the argument that "courts are precluded from commanding what has come to be known as 'interest' or 'prospective' or 'quasi-legislative' arbitration." That court noted that "no compelling reason for disregarding the specific provision to arbitrate a new contract . . . has been brought to our attention." Indeed, that court accurately pointed out that "nothing would be more out of step with our national labor policy than for courts to refuse to enforce a voluntary agreement to arbitrate differences."

We agree with the following analysis from *Winston-Salem Printing Press.*, 493 F.2d at 227:

> A provision to arbitrate when agreement upon a new contract proves impossible, as is the case here, is part of an existing agreement and refusal to comply therewith constitutes a breach. This Court is not asked to determine the provisions of a new contract or to perform any nonjudicial function. The drawing of the new contract will be in the hands of an arbitrator where the parties chose to place the authority and responsibility. The court is asked to do no more than enforce a provision of an existing contract, a traditional judicial function.

Similarly, in *Chattanooga Mailers* v. *Chattanooga News-Free Press*, 524 F.2d 1304 (6th Cir. 1975), Judge McCree reviewed the more recent cases and concluded that "the enforcement of an interest arbitration clause is within the scope and purpose of our national labor policy, and the parties here clearly contemplated arbitration of new contract terms." *See also Nashville News, P.P.U. Loc. 50* v. *Newspaper Print. Corp.*, 518 F.2d 351 (6th Cir. 1975).

We also agree with the conclusion of the Court of Appeals for the Fourth Circuit in *Winston-Salem Printing Press* that arbitration of new contract terms is practicable:

> Although the point is not raised by the Company, some skeptics have suggested that the arbitration of new contracts is unrealistic and unworkable. Our research indicates that quite the opposite is the case. Arbitration of the terms of new contracts preceded the now commonplace grievance arbitration, Witte, Historical Survey of Labor Arbitration (1952), and has been successfully employed in the transit and printing industries for a substantial period of time. Kuhn, Arbitration in Transit (1952); Loft, The Printing Trades (1956).

493 F.2d at 227 n.10.

We find and conclude that the controlling federal labor policy applicable to the enforcement of voluntary arbitration agreements generally is equally applicable to the § 13(c) agreements involved in this case, particularly in light of the fact that such contracts were entered into for the express purpose of obtaining millions of dollars of federal aid. The § 13(c) agreements involved in this case unambiguously require the parties to arbitrate any dispute over the making or maintenance of collective bargaining agreements and the terms to be included in such agreements. This Court is required by applicable law to hold the parties to their agreement.

We find and conclude that application of the principles stated by this Court in *Builders Association of Kansas City* and in *Kansas City Royals* requires that plaintiff prevail on the merits and that the Union is entitled to appropriate equitable relief.

VI.

For the reasons stated, it is

ORDERED (1) that defendant KCATA's motion to dismiss the Union's amended complaint should be and the same hereby is denied. It is further

ORDERED (2) that the parties shall maintain the status quo so far as this litigation is concerned. This order shall not be construed as a prohibition against the resumption of collective bargaining negotiations or the signing of a collective bargaining agreement. It is further

ORDERED (3) that counsel for plaintiff shall promptly prepare a form of final judgment and decree, submit it to counsel for defendant KCATA for approval as to form, and present it to the Court for our consideration.

Counsel are advised that, consistent with our usual practice, we shall stay the execution of our final judgment and decree for a reasonable period of time. Defendant may seek a further stay of execution in the Court of Appeals. *See Kansas City Royals Baseball Corp.* v. *Major League Baseball Ass'n*, 409 F. Supp. at 262-71 (W.D. Mo.), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

Consideration of any Rule 62 application for a stay in this Court, of course, will be considered in light of the new rule of decision stated by the Court of Appeals for the Eighth Circuit in *Fennel* v. *Butler* and *Smith* v. *City of St. Paul*, Nos. 77-1782 and 77-1822 (8th Cir. Feb. 6, 1978). It is further

ORDERED (4) that if counsel agree that a conference with the Court would be helpful to assist counsel in agreeing upon further proceedings leading to the formulation of the final judgment and decree and to provide for prompt and orderly consideration of this case in the Court of

Appeals for the Eighth Circuit, counsel shall so advise one of the Court's law clerks in order that a conference may be scheduled.

/s/ John W. Oliver
Chief Judge

Kansas City, Missouri

February 28, 1978

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1255

Division 1287, Amalgamated Transit Union, AFL-CIO,
Appellee,

v.

Kansas City Area Transportation Authority,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 15, 1978
Filed: August 21, 1978

Before STEPHENSON, Circuit Judge, INGRAHAM, Senior Circuit Judge,* and HENLEY, Circuit Judge.

HENLEY, Circuit Judge.

This is an action for declaratory and injunctive relief brought in the United States District Court for the Western District of Missouri (The Honorable John W. Oliver, District Judge) by Division 1287, Amalgamated Transit Union (Union) against the Kansas City Area Transportation Authority (Authority), which is a public agency that provides mass urban transportation in the general metropolitan area that includes the Cities of Kansas City, Missouri and Kan-

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*The Honorable Joe M. Ingraham, United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

sas City, Kansas. , The Authority was formed in 1967 as a result of a congressionally approved interstate compact between Missouri and Kansas and has received federal financial assistance running into many millions of dollars under the terms of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1601 *et seq.* (the Act).

The suit was filed to compel the Authority to engage in what is known as interest arbitration[1] to settle the terms and conditions of a collective bargaining agreement to take the place of one that expired on November 14, 1977.

The Union contends that it is entitled to interest arbitration by the terms of § 13(c) of the Act, 49 U.S.C. § 1609(c), by the terms of agreements entered into between the Union and the Authority as required by § 13(c) (§ 13(c) agreements), and by the grant contracts that have been entered into between the Authority and the government from time to time since 1968 which contracts have incorporated by reference the prevailing § 13(c) agreements. The Union takes the position that the suit arises under the Act, that the amount in controversy is in excess of $10,000.00, exclusive of interest and costs, and that federal jurisdiction existed in the district court by virtue of 28 U.S.C. § 1331(a).

The Authority contends that the district court lacked subject matter jurisdiction and that in any event the Union was not entitled to the relief that it sought.

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1. Interest arbitration, which is sometimes called contract arbitration or quasi-legislative arbitration, is the arbitration that may be required when an employer and the collective bargaining agent of employees come to an impasse with respect to the terms and conditions of a new collective bargaining agreement. It differs from grievance arbitration which may be required when disputes arise under an existing collective bargaining agreement.

The case was submitted to the district court largely on stipulations of fact. Judge Oliver filed detailed findings of fact, conclusions of law and comments. He concluded that he had jurisdiction and that the Union was entitled to prevail. An appropriate decree having been entered, this appeal followed.

I

The Union represents persons employed in certain capacities by private transit companies and public transportation agencies all over the United States. The record indicates that the Union is a strong believer in the proposition that labor disputes in the urban transportation industry should be settled by arbitration, including interest arbitration, rather than by strikes or lockouts.

As is well known, the urban mass transit industry in this country has been in a deteriorating condition for a long period of time. By 1964, and indeed earlier, Congress had concluded that many private companies would have to be taken over by public agencies, and that federal funds would have to be made available to those agencies in order to permit them to effect the take-overs. The result of that determination was the statute involved in this case.

The Act authorizes grants or loans of federal funds to state or local public authorities to enable them to acquire private transit companies. Employees of those companies will presumably become employees of the public agencies, and when it passed the Act Congress was concerned with the economic risks that such employees might incur as a result of the take-overs. Those risks might include loss of collective bargaining rights, loss of the right to strike, and loss of pension and retirement benefits. Section 13(c) of the Act is designed to protect, at least in large mea-

sure, the rights and interests of such employees from such risks.

In substance, § 13(c) provides that as a condition to a federal grant or loan the public agency applying for the same must enter into a protective agreement with the employees of the company to be taken over or with the collective bargaining agent of those employees. The agreement must be approved by the Secretary of Labor, and when approved it becomes a part of the grant contract between the agency and the government.

A § 13(c) agreement must preserve the rights of employees existing at the time of the public take-over, must preserve collective bargaining rights, and must protect employees from the worsening of their conditions of employment. The protection that must be provided against worsening of employment conditions must be at least equal to the protection that is afforded by 49 U.S.C. § 5(2)(f) to employees of rail carriers subject to the jurisdiction of the Interstate Commerce Commission who may be adversely affected by combinations or mergers of railroads.

II

For many years prior to the Authority's establishment and take-over of mass transportation in the Kansas City area, patrons of mass transportation services relied principally on Kansas City Transit Company and on nine much smaller companies.

The employees of Kansas City Transit Company (Transit) were covered by the National Labor Relations Act, and the Union was their bargaining representative. The collective bargaining agreements that were in force between the Union and Transit from time to time contained no-strike clauses and also provided a procedure whereby

the parties could agree to continue bargaining after the expiration of a contract and to submit to binding arbitration any contract terms with respect to which they found themselves unable to agree.

The last of the agreements between the Union and Transit was executed on December 6, 1967 and covered an initial period between November 1, 1967 and October 31, 1968. It was automatically to be renewed from year to year thereafter unless the Union or Transit gave notice of termination not less than sixty days from the anniversary date of the contract. If a notice of termination was not given within that period or was withdrawn before the termination of the contract, a new contract was to be negotiated between the parties and terms on which they could not agree would be settled by interest arbitration.

Having been duly formed, the Authority in 1968 applied successfully to the government for a multi-million dollar grant to enable it to take over Transit and the smaller companies, to buy new busses, and to improve transit services in the Kansas City area. As required by the Act, a § 13(c) agreement was worked out between the Authority and the Union, was approved by the Secretary of Labor, and became a part of the grant contract between the Authority and the government.

The Authority took over urban transit operations in the Kansas City area in 1969, and since that time it has applied for and obtained numerous additional large grants of federal funds. In connection with the new grants new § 13(c) agreements have been entered into or it has been agreed that an existing agreement would be applicable to the new grant.

The Authority and the Union have entered into a number of collective bargaining agreements. At times the

parties have not been able to agree as to the terms of a new agreement, and their disputes have been resolved by interest arbitration.

The most recent collective bargaining agreement between the Authority and the Union was executed in March, 1974 but was back-dated to November 1, 1973. The contract was to continue in force from year to year unless one of the parties gave written notice of termination not less than sixty days prior to the anniversary date of the contract.

By the fall of 1977 a number of differences between the Authority and the Union had arisen and on September 16, 1977 the Authority gave notice to the Union that the existing agreement would be terminated. The Union promptly demanded interest arbitration, and this suit was filed when the Authority refused to submit to arbitration as to the terms and conditions of a new contract.

III

We address ourselves, first, to the question of whether the district court had subject matter jurisdiction of the complaint. The position of the Authority is that this is simply a suit on a contract and does not arise under the Constitution or laws of the United States. The defendant also contends that there is an absence of the amount in controversy that is requisite in order to confer jurisdiction under 28 U.S.C. § 1331(a).

As to jurisdictional amount, the district court found that the evidence was insufficient to establish "to a legal certainty" that the amount in controversy was not in excess of $10,000.00, exclusive of interest and costs, as to each employee of the Authority, and the district court also found that the Union's financial interest in the case exceeded the jurisdictional minimum. On this question it is

sufficient to say that we agree with the district court. *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 346-48 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Gibbs v. Buck*, 307 U.S. 66, 72-76 (1939); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-90 (1938); *Local Div. 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Utility and the City of LaCrosse, Wisconsin*, 445 F.Supp. 798, 809-10 (W.D. Wis. 1978), *appeal pending*. *Cf. Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 394 U.S. 332 (1969); *Brotherhood of Railroad Trainmen v. Templeton*, 181 F.2d 527 (8th Cir.), *cert. denied*, 340 U.S. 823 (1950); and *Montgomery Ward & Co. v. Langer*, 168 F.2d 182 (8th Cir. 1948).

The question of whether the case is one that "arises under" the laws of the United States is a more troublesome one, and one that has not been answered as yet by any federal appellate court. The district courts are divided on the question. The majority of those courts have held that subject matter jurisdiction does not exist.[2] However, in

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2. *See Metropolitan Atlanta Rapid Transit Authority v. Local Division 732, Amalgamated Transit Union* (N.D. Ga. 1973); *Local Div. No. 714, Amalgamated Transit Union v. Greater Portland Transit District* (D. Me. 1978); *Local Div. 1285, Amalgamated Transit Union v. Jackson Transit Authority* (W.D. Tenn. 1977-78). Appeals are now pending in the Portland, Maine case and in the Jackson, Tennessee case.

Another case that is of interest here is *Div. 580, Amalgamated Transit Union v. Central New York Regional Transportation Authority*, N.D. N.Y. No. 77-CV-45. In that case the Union sought to compel interest arbitration and moved for a preliminary injunction; the defendant resisted that motion but did not immediately raise any jurisdictional question. The motion was denied by the district court, and the Union appealed. The action of the district court was upheld by the Court of Appeals for the Second Circuit without any cognizance being taken of a possible jurisdictional question. *Div. 580, Amalgamated Transit Union v. Central New York Regional Transportation Authority*, 556 F.2d 659 (2d

(*Continued on following page*)

Local Div. 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Ultility and the City of LaCrosse, Wisconsin, supra, 445 F.Supp. at 804-09, District Judge Doyle of Wisconsin held that a case involving a claim of a breach of a § 13(c) agreement is a case that arises under the laws of the United States. As far as jurisdiction is concerned, Judge Oliver's holding in this case is expressly based on the opinion of Judge Doyle in *Local Div. 519.*[3]

The question of whether a particular case is one that "arises under" the Constitution or laws of the United States is not always an easy one to answer. 13 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, § 3562, pp. 397-414. The question is entirely separate and distinct from the question of whether the plaintiff's complaint states a claim upon which relief can be granted and the question of whether there is any merit to the claim. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,*

Footnote continued—

Cir. 1977). On remand the defendant raised the question of subject matter jurisdiction, and the district court held that jurisdiction did not exist. There was another appeal by the Union. While that appeal was pending, the Union and the Transportation Authority settled their differences and executed a new collective bargaining agreement. The court of appeals held that this development rendered the controversy moot and declined to pass on the jurisdictional question. *Div. 580, Amalgamated Transit Union v. Central New York Regional Transportation Authority,* ..... F.2d ..... (2d Cir. No. 77-7546 June 7, 1978).

3. An appeal is pending in that case. We note, however, that on February 14, 1978 a panel of the Court of Appeals for the Seventh Circuit refused to grant to the defendant utility a stay of the preliminary injunction that Judge Doyle had granted. The panel said "that the defendants-appellants must now proceed to arbitration does not constitute irreparable harm so as to justify this court in staying the preliminary injunction. That preliminary injunction was issued after careful consideration by the district court." Judge Oliver decided this case on February 28, 1978, and he mentions the Seventh Circuit's order of February 14 which had not been entered when this case was briefed in the district court.

341 U.S. 246, 249 (1951); *Bell v. Hood,* 327 U.S. 678, 682-83 (1946); *Gully v. First Nat'l Bank,* 299 U.S. 109, 112-14 (1936); *Norton v. Blaylock,* 285 F.Supp. 659, 661-62 (E.D. Ark. 1968), *aff'd,* 409 F.2d 772 (8th Cir. 1969).

In *Gully v. First Nat'l Bank, supra,* 299 U.S. at 112-13, the Court said:

> How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin v. New York,* 115 U.S. 248, 257; *First National Bank v. Williams,* 252 U.S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid; King County v. Seattle School District,* 263 U.S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (*New Orleans v. Benjamin,* 153 U.S. 411, 424; *Defiance Water Co. v. Defiance,* 191 U.S. 184, 191; *Joy v. St. Louis,* 201 U.S. 332; *Denver v. New York Trust Co.,* 229 U.S. 123, 133), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee v. Union & Planters Bank,* 152 U.S. 454; *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149; *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25; *Taylor v. Anderson,* 234 U.S. 74. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.

Devine v. Los Angeles, 202 U.S. 313, 334; *The Fair v. Kohler Die & Specialty Co., supra.*

And the Court cited with approval the earlier case of *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912), wherein it was said:

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.

More recently, this court held that if a case is to be considered as one arising under federal law, "the federal right relied upon for jurisdiction must be a paramount and not a collateral issue." *Baker v. Riss & Co.*, 444 F.2d 257, 259 (8th Cir. 1971).

And, of course, in order to confer federal question jurisdiction on a district court the federal question raised must be substantial and not plainly frivolous. *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974); 13 WRIGHT, MILLER & COOPER, *supra*, § 3564, pp. 426-30.

We have mentioned already the purpose of the Act and the concern of Congress with respect to the economic interests of employees of private transit companies that were to be taken over by public agencies. Section 13(c) of the Act does not simply direct a public agency seeking a federal grant and a labor union representing transit employees to sit down at the bargaining table and enter into any kind of a contract that is mutually agreeable to them. As has been seen, § 13(c) prescribes at least minimum standards for employee protection, requires that the agreements in question be approved by the Secretary of Labor, and provides that the agreements become part of the contracts between the public agencies and the government itself.

Although the question is not free from doubt, we now hold that a controversy between a public transit agency and a labor union involving a claim of breach of a § 13(c) agreement is a controversy that arises under the laws of the United States. *See Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Burlington Northern, Inc. v. American Railway Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry. Co.*, 314 F.2d 424 (8th Cir. 1963), *aff'g Chicago & North Western Ry. Co. v. Brotherhood of Locomotive Engineers*, 202 F.Supp. 277 (S.D. Ia. 1962).

IV

On the merits the Authority makes two arguments for reversal: first, that as an alternative to interest arbitration the parties had a right to terminate their conractual relationship. Second, that an agreement by the Authority to binding interest arbitration would be illegal as an impermissible delegation of power by a public body. We reject both arguments.

A

The controversy between the parties actually involves three separate and distinct contracts: (1) the underlying collective bargaining agreement between the Authority and the Union; (2) the § 13(c) agreement between the Authority and the Union; and (3) the grant contract between the

Authority and the government. This suit is based on the § 13(c) contract and not on the collective bargaining agreement or on the contract between the Authority and the government.

The first § 13(c) contract between the Union and the Authority was entered into in 1968; however, that contract does not differ substantially from the one that was entered into in 1973 and which has been extended to grants that the Authority has received from the government since that time. Section 24 of the 1973 § 13(c) agreement is as follows:

> In the event the Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the federal government and the applicant for federal funds, provided, however, that this agreement shall not merge into the contract of assistance, but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms; nor shall the collective bargaining agreement between the Union and the operator of the transit system merge into this agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

The termination and arbitration provisions of the collective bargaining agreement between the Union and the Authority that was executed in 1974 appear as §§ 4 and 9 of that agreement, and those sections do not differ substantially, if at all, from comparable provisions appearing in the last collective bargaining agreement that the Union and Transit entered into in 1967. It appears to us that under the 1974 agreement either side could have avoided interest arbitration by giving a sixty day notice of termination. As has been pointed out, however, this suit is based on the § 13(c) agreement, and the rights of the parties must be measured by that agreement which is not identical in terms to the collective bargaining agreement. The controlling provision of the § 13(c) agreement is § 17 of that agreement which, insofar as here pertinent, is as follows:

> In the case of any labor dispute (except as defined in paragraph (11) hereof) where collective bargaining does not result in agreement after all reasonable efforts to agree in good faith, the same may be submitted at the written request of either party to a board of arbitration composed of three (3) persons as hereinafter provided, one to be chosen by the Authority, one to be chosen by the Union, and the two thus selected to select a third disinterested arbitrator; the finding of the majority of said board of arbitration shall be final and binding on the parties hereto; all contract conditions shall remain undisturbed and there shall be no lockouts, strikes, walk-outs or interference with or interruption of service during the arbitration proceedings.
>
> Each party shall appoint its arbitrator within five (5) days after notice of submission to arbitration has been given. If the two arbitrators selected by the parties are unable to agree upon the selection of the third arbitrator within five (5) days from the date of appointment of the second-named arbitrator, then either arbitrator may request the American Arbitration Association to furnish a list of seven (7) members of the National Academy of Arbitrators from which the elimination, and thereafter each shall, in that order, pointed by the parties shall, within five (5) days after the receipt of such list determine by lot the order of elimination, and thereafter each shall, in that order,

alternately eliminate one name until only one name remains. The remaining person on the list shall be the third arbitrator. In each instance, the foregoing time limits are exclusive of Saturday, Sunday and holidays. Such time limits may be extended by mutual agreement of the parties in writing.

* * *

The term 'labor dispute' shall be broadly construed and shall include any controversy concerning wages, salaries, working conditions or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintenance of collective bargaining agreements, the terms to be included in such agreements, the interpretation of application of such agreements, the adjustments of grievances, any claim, difference, or controversy arising out of or by virtue of any of the provisions of this agreement for the protection of employees covered by this agreement affected by the Project.

The arbitration board shall make every reasonable effort to render its decision within thirty (30) days from the date of the completion of the hearings in the proceedings, or within such longer period as the parties to the proceedings may mutually agree upon in writing. The decision of the arbitration board shall be in writing, signed by a majority of the members thereof, and original counterparts thereof shall be filed with the Authority and the Union.

Nothing in this paragraph (17) shall be construed to enlarge or limit the right of either party to utilize, upon the expiration of any collective bargaining agreement, any economic measures that are consistent or not in conflict with applicable law.

In view of that language, we are of the opinion that the contract required interest arbitration at the request of either party upon the expiration of a collective bargaining agreement. Our conclusion is bolstered by the history of negotiations between the parties that is revealed by the record, and by the fact that on two occasions prior to 1977 contract differences between the Authority and the Union were in fact resolved by interest arbitration rather than by strikes or other economic measures.

B

In the district court the Authority contended broadly that an agreement to arbitrate the terms of a future collective bargaining agreement will not be enforced by the courts. Judge Oliver properly rejected that contention. *See Winston-Salem Printing Pressmen & Assistants' Union v. Piedmont Publishing Co. of Winston-Salem*, 393 F.2d 221 (4th Cir. 1968); *Greater Kansas City Laborers District Council v. Builders Ass'n of Kansas City*, 217 F.Supp. 1 (W.D. Mo. 1963), *aff'd*, 326 F.2d 867 (8th Cir.), *cert. denied*, 377 U.S. 917 (1964).

The Authority contends here that any obligation on its part to engage in binding interest arbitration would amount to an unlawful delegation of the powers and authority that have been conferred upon it as a public body. We do not think that this argument can be sustained in the context of the present case.

As is well known, the federal policy in favor of arbitration as a means of settling labor disputes is a very strong one. In addition to the cases last cited, *see* the familiar "*Steel Workers Trilogy*" of cases beginning with *United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *see also General Electric Co. v. Local 205*,

United Electrical, Radio & Machine Workers of America, 353 U.S. 547 (1957), and *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

That policy would appear to be particularly applicable in the vital area of urban mass transit where strikes of workers are in the highest degree undesirable from the standpoint of the public.[4]

We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

We agree with Judge Doyle in *Local 519, supra*, 445 F. Supp. at 811, that Congress intended that the rights of transit employees be protected by contracts, and that it intended that the contracts entered into by the parties and approved by the Secretary of Labor would be enforceable, and that it would be fatuous to hold otherwise.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

4. In this connection we call attention to the findings of Congress as to the importance of mass urban transportation that are set out in 49 U.S.C. §§ 1601, 1601a and 1601b.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1255

September Term, 1977

Division 1287, Amalgamated Transit Union, AFL-CIO,
Appellee,

vs.

Kansas City Area Transportation Authority,
Appellant.

JUDGMENT

(Filed August 21, 1978)

Appeal from the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 21, 1978

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1978

No. 78-1255

Division 1287, Amalgamated Transit Union, AFL-CIO,
Appellee,

vs.

Kansas City Area Transportation Authority,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 21, 1978

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1978

No. 78-1255

Division 1287, Amalgamated Transit Union, AFL-CIO,
Appellee,

vs.

Kansas City Area Transportation Authority,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri.

On the Court's own motion it is now here ordered that the following changes be made in the slip opinion filed in this cause on August 21, 1978:

(1) The date that appears on the last line of the first full paragraph on page 2 of the slip opinion is changed from October 31, 1977 to November 14, 1977.

(2) Footnote 4 on page 13 of the slip opinion is deleted.

(3) Footnote 5 on page 16 of the slip opinion now becomes Footnote 4.

September 21, 1978

49 U.S.C. Sec. 1609(c)
78 Stat. 307

(c) It shall be a condition of any assistance under section 3 of this Act [§1602 of this title] that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended [§5(2)(f) of this title]. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Sec. 238.100, RSMo.
K.S.A. Sec. 12-2534
82 Stat. 338

Additional powers and duties of commissioners.—In further effectuation of that certain compact between the states of Missouri and Kansas heretofore made and entered into on December 28, 1965, the Kansas City area transportation authority of the Kansas City area transportation district, created by and under the aforesaid compact, is authorized to exercise the following powers in addition to those heretofore expressly authorized by the aforesaid compact:

(1) To make all appointments and employ all its officers, agents and employees, determine their qualifications and duties and fix their compensation;

(2) To deal with and enter into written contracts with the employees of the authority through accredited representatives of such employees or representatives of any labor organization authorized to act for such employees, concerning wages, salaries, hours, working conditions, pension or retirement provisions, and insurance benefits;

(3) To provide for the retirement and pensioning of its officers and employees and the widows and children of the deceased officers and employees, and to provide for paying benefits upon disability or death of its officers and employees and to make payments from its funds to provide for said retirements, pensions and death or disability benefits.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

PETITIONER'S [redacted]

SUPPLEMENTAL SUGGESTIONS SUPPORTING GRANTING OF WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

PETITIONER'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL SUGGESTIONS

Comes now petitioner and moves the Court to grant leave to file supplemental suggestions in support of its petition for writ of certiorari, copy of which supplemental suggestions is attached hereto. In support of the motion petitioner states that its petition was filed November 2, 1978 and that an intervening ruling of the Court of Appeals for the First Circuit, on November 15, 1978, materially affects consideration of Questions 1 and 2 presented by the peti-

tion. As a result of said ruling, petitioner submits that it is appropriate to add the attached brief comments pertaining to the enhanced significance of Question 4 presented by the petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

SUPPLEMENTAL SUGGESTIONS SUPPORTING GRANTING OF WRIT OF CERTIORARI

Petitioner Kansas City Area Transportation Authority ("the Authority") hereby advises the Court that the Court of Appeals for the First Circuit has now ruled, contrary to petitioner's contentions, that Federal Question jurisdiction and an implied Federal cause of action do exist, to litigate transit union claims of breach of contract by a public body, where the contract was entered into for the purpose of receiving Federal subsidies, pursuant to Sec. 13(c) of the

Urban Mass Transportation Act. The Court so ruled in an unreported opinion filed November 15, 1978, in *Local Div. No. 714, Amalgamated Transit Union* v. *Greater Portland Transit District*, No. 78-1077.

The 1977 and 1978 views of five District Judges continue to favor petitioner's position, as noted in the petition (page 8). Petitioner recognizes, however, that the Court may wish to consider the impact of the *Portland* ruling on petitioner's Questions 1 and 2.

Questions 1, 2 and 3 continue to present important issues of Federal jurisdictional and substantive law which petitioner believes are worthy of this Court's review, for reasons stated in its petition.

A most compelling point for review at this time, in petitioner's opinion, is Question 4, relating to so-called "spending power preemption". As stated at pages 13-14 of the petition, adoption of a theory that Federal assistance should cause courts to estop local public transit authorities from asserting lack of power to delegate their wage-making functions to a private arbitrator is (1) contrary to Congressional intent, (2) unsupported by statutory language, and (3) directly contrary to the express contract provisions agreed to by the petitioner and other transit authorities, the Union and the Federal funding agency, which expressly subordinate grant contract provisions to controlling principles of local law (and Federal law pertaining to the powers of a body created by bi-state compact, approved by Congress).[1]

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1. The standardized contract language supplied by the International Union provided that "In the event any provision of this agreement is held to be invalid or otherwise unenforceable under the Federal, State or local law, such provision shall be renego-

(*Continued on following page*)

When spending power preemption occurs, it must be candidly viewed as a presumably well-motivated or benevolent form of Federal bribery. The case at bar offers the Court a significant opportunity, critical to the budgetary interests of local transit systems throughout the country, to set much-needed limits and disciplines on a preemption concept which threatens sound Federal-State relationships. Nothing in the present case authorizes "a sweeping step that strikes at the core of state prerogative". *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973).

Additional reasons and authorities relating to Question 4 are briefed by the American Public Transit Association, at pages 35-40 of its proposed brief of amicus curiae, dated November 9, 1978, heretofore presented to the Court with a motion for leave to file the same.[2]

The ruling below requires the Authority to take illegal action, in excess of its authorized powers. This conclusion is not questioned by either the Union or the Court of Appeals. Estoppel under the preemption doctrine is not justified by the circumstances, here or in related situations

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Footnote continued—

tiated", reserving the right of either party to "invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements". Apdx. 36, 234 (Record below). The 1969 Federal grant contract contains a similar provision: "Anything in the Grant Contract to the contrary notwithstanding, nothing in the Grant Contract shall require the Public Body to (take any action) in contravention of any applicable State or territorial law. . ." Apdx. 64 (Record below).

2. The unsupported rationale of the Court of Appeals is stated at Appendix page A40, attached to the petition for a writ of certiorari. It is clear that the Court below has failed to perceive the "shift in emphasis" by this Court, against preemption, especially where, as here, the administrative agencies have expressly declined to preempt local law. *Kargman* v. *Sullivan*, 552 F.2d 2, 11, 12 (1st Cir. 1977).

throughout the country. It is respectfully submitted that the decision below should be reviewed and reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

vs.

DIVISION 1287, AMALGAMATED TRANSIT UNION, AFL-CIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATUTES INVOLVED

It shall be a condition of any assistance under this chapter that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the

protection of individual employees against a worsening of their positions with respect to employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements. 49 U. S. C. § 1609(c).

QUESTIONS PRESENTED

Whether the Court of Appeals erred in holding that Plaintiff's claim to enforce § 13(c) of the Urban Mass Transportation Act of 1964, 49 U. S. C. § 1601 *et seq.*, mandating protective arrangements as determined by the Secretary of Labor for employees of recipients of federal funds, arose under federal law as required by 28 U. S. C. § 1331.

Whether the Court of Appeals erred in affirming the District Court's finding that the agreements concluded by Defendant Kansas City Area Transportation Authority ("KCATA") determined by the Secretary to fulfill the mandate of § 13(c), included the obligation to arbitrate the terms of a new collective bargaining agreement, at the instance of either party.

Whether the Court of Appeals erred in rejecting KCATA's contention that general municipal law doctrines of some states render retroactively invalid its agreements of ten years standing, concluded in fulfillment of the federal statutory requisites for the receipt of millions of federal dollars.

STATEMENT OF THE CASE

Petitioner, KCATA, requests this Court to review the ruling of the United States Court of Appeals for the Eighth Circuit enforcing § 13(c) of the Urban Mass Transportation Act, 49 U. S. C. § 1609(c). The Act provides that grant recipients shall make arrangements to protect the interests of employees affected by the assistance.

In 1968, just after KCATA was created, it applied for and received a large federal grant to commence operations (A. 7-8). As set forth in the federal Act, to qualify for the federal money, KCATA and the Union concluded a § 13(c) Agreement setting forth the specifics of the requisite fair and equitable arrangement; the arrangements were also specified in the grant contract with the United States (A. 11-13). The § 13(c) Agreement provided for arbitration of the terms and conditions of a new collective bargaining agreement, in the event collective bargaining resulted in an impasse ("interest arbitration") (A. 11-12). The Secretary of Labor determined that the statutory requirements were fulfilled by the terms of the § 13(c) Agreement submitted by KCATA, and KCATA received its federal funds (A. 11-13). Thereafter, each time KCATA sought more funds under the UMT Act, the parties concluded successive Agreements, embodying the same provision (A. 13-15). In the last ten years, since KCATA began operations after its first UMTA grant, the parties referred their collective bargaining agreements to interest arbitration twice (A. 15).

This case arose when, for the first time since 1968, KCATA refused to arbitrate after impasse (A. 16). The District Court ruled that it had jurisdiction to consider Plaintiff's claim for enforcement of § 13(c); after two days of hearing, the Court held that the § 13(c) Agreements, determined by the Secretary to fulfill the statutory needs, mandated arbitration in this instance and rejected KCATA's defense that arbitration was beyond its authority (A. 18-24).

The District Court entered a permanent injunction ordering KCATA to arbitrate this dispute, and the Court of Appeals for the Eighth Circuit affirmed (A. 25). After an examination of the role of the § 13(c) Agreements in carrying out the federal statutory scheme, the Court concluded that the action arose under federal law, under the standards set forth by this Court in *Bell* v. *Hood*, 327 U. S. 678 (1946). On the merits, the Court also affirmed the District Court ruling that the contracts mandated arbitration, in light of the documents themselves, the history of the negotiations that produced them and the subsequent conduct of the parties. Finally, the Court rejected KCATA's contention that doctrines of state law compelled it to repudiate its commitments, noting that the case involved the "vital" interests of labor peace in urban mass transit and the special case of a bistate transit agency established for purposes of receiving federal UMTA money (A. 40). In so ruling, the Eighth Circuit was but the first of three Courts of Appeals ruling in favor of the position of respondent here this year. *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981 (7th Cir. 10/19/78);[1] *Local 714* v. *Portland*, No. 78-1077 (1st Cir. 11/15/78).[2]

1. A copy of the as yet unpublished opinion of the Court of Appeals for the Seventh Circuit in *Local 519* is reproduced herein as Respondent's Appendix, p. A1.

2. A copy of the as yet unpublished opinion of the Court of Appeals for the First Circuit in *Local 714* is reproduced herein as Respondent's Appendix, p. 21.

ARGUMENT

The Petitioner has not presented this Court with any reason to exercise its discretionary writ to review this case. There is no conflict in the Circuits; indeed, three circuits have affirmatively ruled in support of Respondent here. There is no conflict with any settled decisions of this Court; this Court has already ruled several times in favor of Respondent's position here regarding federal subject matter jurisdiction. On the merits, the decision below is well-founded in the facts of this case and the law of the states involved, as this Court has repeatedly ruled, a subject uniquely suited to resolution by the local federal courts.

I. The Courts of Appeals Are Unanimous in Resolving the Issues Here in Favor of Respondent.

As set forth above, this is one of several cases involving § 13(c) of the UMTA, decided this year. *Local 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978); *Local 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra; Local 714* v. *Portland, supra; Local 1285* v. *Jackson Transit Authority*, No. 78-1185 (*appeal pend'g.*, 6th Circuit).

In the three appellate opinions, the Courts of Appeals all recognized that Plaintiffs were seeking to enforce a federal statute establishing conditions on federal funding through the vehicle of agreements determined by the Secretary of Labor in each case to carry out the mandate of the Act.

Accordingly, without even a dissenting opinion, the three Courts of Appeals held that, for purposes of federal subject matter jurisdiction, these actions to enforce the conditions on federal spending "arose under" the federal statute creating the conditions and were properly enforced by representatives of the benefited classes. As the Courts recognized, to have held otherwise would have produced the anomalous result that a federal statute, not committed to public inforcement as part of a federal regulatory scheme, could not be enforced in the federal courts. In the words of two of the Appeals Courts sustaining the enforceability of the federal Act, "Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise." 582 F. 2d, at 453, and *Local 519, supra,* (Resp. App., p. A17).

In the fourteen years since passage, the published precedent reflects almost no other such actions, state or federal.[3] As the opinions indicate, the short burst of controversy over § 13(c) reflected the bench ruling of Judge Port in 1977 in *Division 580* v. *CENTRO,* No. 77-CV-45 (N. D. N. Y. 1977), that the federal courts lacked subject matter jurisdiction to consider an action to enforce § 13(c).[4] While the appeal from Judge Port's

3. Amicus APTA suggests that the decision here would generate a wave of litigation and flood the federal courts. (Am. Cur., p. 32). To the contrary, although all parties acknowledge that § 13(c) Agreements have been common in the industry for at lease ten years and could have been enforced, at least in state courts, at any time, there are almost no such reported decisions. Until this year, the Agreements, operating in the context of settled collective bargaining relationships, were the source of little controversy. For example, here, in the Kansas City case, the parties arbitrated two collective bargaining agreements during the ten years since the first § 13(c) Agreement, without any talk of litigation. (A. 15).

4. *Division 580* went to the courts initially, because of a waiver issue not present in any of the other cases. The District Judge and the Court of Appeals exercised federal jurisdiction to decide the waiver issue on a motion for preliminary injunction. Thereafter, on remand, Judge Port dismissed for want of jurisdiction. See Op. of Judge MacMahon in *Division 580, supra* (No. 77-CV-45, 2/9/77),

(Footnote continued on next page)

ruling was pending, the parties concluded a collective bargaining agreement, and the opinion was vacated as moot. Thereafter all the other Courts of Appeals ruled for Respondents on every issue.

II The Eighth Circuit Decision Is Consistent with the Rulings of This Court.

As set forth above, § 13(c), in a form typical of federal spending legislation, imposes a number of conditions on the receipt of federal funds. One condition is that a recipient of federal UMTA money must make fair and equitable arrangements for the protection of the interests of its employees. The statute mandates minimum conditions and leaves it to the sound discretion of the Secretary of Labor to determine what remaining fair and equitable arrangements are required by the Act in each specific instance.[5]

(Footnote continued from preceding page.)

aff'd, 556 F. 2d 659 (2nd Cir. 1977). In the two cases dismissing for want of federal jurisdiction, both Judges relied heavily on a transcript of Judge Port's ruling. The Opinion in *Division 714* has now been reversed, and *Local 1285, ATU* v. *Jackson, supra,* is pending on appeal.

To create an appearance of divided lower Court opinion, Amicus and KCATA are reduced to relying on two unpublished decisions, remanding after removal actions to enforce § 13(c) Agreements. *Metropolitan Atlanta Rapid Transit Authority* v. *Division 732, Amalgamated Transit Union,* No. 14892 (N. D. Ga., 7/1/73); *Transit Authority of Louisville and Jefferson County* v. *Amalgamated Transit Union,* No. 76-0535-1(B) (W. D. Ky. 7/20/77). These cases are of little weight, since, in each case, the federal court was construing the transit authority's complaint alleging a violation of contract to determine the propriety of removal. Where the facts can support both a state and a federal claim, the Courts on removal treat Plaintiff as master of his own claim and defer to his judgment regarding forum. *LaChemise LaCoste* v. *Alligator Co.,* 506 F. 2d 339 (3rd Cir. 1974), *cert. den.,* 421 U. S. 937; *Jones* v. *General Tire & Rubber Co.,* 541 F. 2d 660 (7th Cir. 1976). Of course, remand cannot be appealed. 28 U. S. C. § 1447(d).

5. Contrary to the representation of amicus, the statute does not speak of "harm" to employee interests; merely "affect." (Am. Cur.,

(Footnote continued on next page)

In sustaining federal subject matter jurisdiction in these cases, the Courts of Appeals properly relied on this Court's decision in *International Association of Machinists* v. *Central Air Lines, Inc.*, 372 U. S. 682 (1963).[6] In *Machinists*, this Court ruled that a federal statute that mandates the making of an arrangement also mandates its enforcement and/or construction by a federal court.[7]

In language particularly appropriate to this case, this Court outlined how the action arose under federal law:

> It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes.

(Footnote continued from preceding page.)

pp. 19, 21, 22). The legislative history of § 13(c) shows that Congress was quite aware that federal money could have an "effect" without necessarily doing immediate "harm." Congress was particularly alert to the effect on employee rights of the conversion of private transit to public—the situation here. Sen. Hearings on S. 6 before the Subcommittee on Housing of the Sen. Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), ("hereafter Sen. Hearings"), at 314, 325, and Hearings on H. R. 3881 before House Comm. on Banking and Currency, 88th Cong., 1st Sess. (1963), at 563.

6. The Courts routinely applied the standard of *Bell* v. *Hood, supra*, and determined the Plaintiff's claim was not frivolous, insubstantial or made for purposes of federal jurisdiction. The *Bell* standard was just reiterated by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 98 S. Ct. 2620 (1978).

7. In direct conflict with the holding and language of *Machinists* Amicus Curiae proposes that:

> In this case, the necessary labor protections mandated by the statute are in place, the protections are quite incidental to the statutory purpose and program, and there is no federal interest in policing the arrangements. (Am. Cur., p. 19).

In *Machinists*, this Court reversed the ruling of the Court of Appeals for the Fifth Circuit that a statute mandating an Agreement is satisfied the moment the arrangements are concluded, leaving the federal statutory scheme to any state contract law that happened to apply. Compare, *Machinists, supra*, with *Machinists*, 295 F. 2d 209, at 211, 215-16 (5th Cir. 1961).

> It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provisions contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. *Id.*

Since *Machinists*, the Courts have repeatedly ruled, in reliance on *Machinists*, that an action to enforce an agreement mandated by federal law arises under federal law. *Florida East Coast Railroad* v. *Jacksonville Terminal*, 328 F. 2d 720 (5th Cir.) *cert. denied*, 374 U. S. 830 (1964); *Brotherhood of Railway, etc.* v. *Special Board of Adjustment*, 410 F. 2d 520 (7th Cir. 1969), overruled on other grounds, *Merchants Despatch Transportation Company* v. *Systems Federation, etc.*, 551 F. 2d 144 (7th Cir. 1977) (reaffirming principle at issue here).

As two of the appeals courts noted, the results here are also substantially supported by this Court's decision exercising jurisdiction in *Norfolk and Western Railway Company* v. *Nemitz*, 404 U. S. 37 (1971), to enforce the specifics of an employee protective arrangement the making of which was mandated by § 5(2)(f) of the Interstate Commerce Act.[8]

The Interstate Commerce Act contains several provisions for arrangements similar to § 5(2)(f) and U. M. T. A. § 13(c), and the Courts of Appeals have also repeatedly exercised federal jurisdiction under 28 U. S. C. § 1331 and 28 U. S. C. § 1337 at the instance of the persons protected. *Brotherhood of Locomotive Engineers* v. *Chicago & Northwestern Rwy.*, 314 F. 2d 424 (8th Cir. 1963), *cert. denied, Burlington Northern, Inc.* v. *American Railway Supervisors Association*, 503 F. 2d 58 (7th Cir. 1974), *cert. denied*, U. S. 975 (1975); *Florida East Coast Railway, supra.*

8. Congress, in considering § 13(c), made repeated reference to the provisions of § 5(2)(f). See, esp., Sen. Hearings, at 330-331.

Both before and after § 13(c), Congress, pursuant to the spending power, passed a host of similar statutes imposing various conditions on the receipt of federal funds.[9] See, for example, the Davis-Bacon Act, 40 U. S. C. § 276a and the Housing Act, 42 U. S. C. § 1455(c). Under each of these statutes, as in § 13(c), the grant recipient must both make arrangements for the benefited group and sign a written contract including such arrangements with the United States.[10]

In numerous cases in several circuits, the federal courts have exercised jurisdiction to enforce these statutory conditions against the grant recipients at the instance of representatives of the benefited class. In each case, the Court either explicitly found or routinely exercised federal jurisdiction. Explicitly or implicitly, each decision holds that the individual Plaintiff had standing to sue and the implied private federal right to enforce the arrangement against the recipient. *Norwalk CORE* v. *Norwalk Redevelopment Authority*, 395 F. 2d 920 (2nd Cir. 1965); *Bradford School Bus Transit* v. *CTA*, 537 F. 2d 943 (7th Cir. 1976), *cert. denied*, 429 U. S. 1066, 1977; *Garrett* v. *City of Hamtramck*, 503 F. 2d 1236 (6th Cir. 1974); *M. M. Crockin Co.* v. *Portsmouth Redevelopment & Housing Authority*, 437 F. 2d 784 (4th Cir. 1971); *Fletcher* v. *Housing Authority of Louisville*, 491 F. 2d 793 (6th Cir. 1974); *vac. on other grds.*, 419 U. S. 812, *aff'd on rem.*, 525 F. 2d 532; *McDaniel* v.

9. During the debates on § 13(c), Congress was explicitly referred to President Kennedy's Executive Order imposing federal conditions on recipients of federal housing money, and the legislative history and language are unmistakable. Sen. Hearings, at pp. 326, 640. Section 13(c) is but one of several federal conditions for receipt of UMTA money. For example, see 49 U. S. C. § 1602(g), prohibiting grant recipients from competing with private school bus companies.

10. In essence, these laws embody the principles set forth in *King* v. *Smith*, 392 U. S. 309, 332, n.34:

> There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, . . .

University of Chicago, 512 F. 2d 583 (7th Cir. 1975); *vacated*, 423 U. S. 810, *reaff'd. on rem.*, 548 F. 2d 689 (7th Cir. 1977); *cert. denied*, 98 S. Ct. 765 (1978); *Euresti* v. *Stenner*, 458 F. 2d 1115 (10th Cir. 1972); *Bossier* v. *Lemon*, 370 F. 2d 847 (5th Cir. 1967), *cert. denied*, 388 U. S. 911 (1967).

Properly viewed as one of many conditions on federal money, enacted routinely under the spending power, § 13(c) falls easily into place, and it is not surprising that the cases decided this year provide unbroken authority for its enforcement.

The Courts of Appeals for the First and Seventh Circuits have also properly refused to squeeze this case into the framework of *Cort* v. *Ash*, 422 U. S. 66 (1975), for implication of a private damage remedy under a federal regulatory scheme.[11] In the case at hand, the Court of Appeals for the Eighth Circuit was actually not presented with the contention that § 13(c) is not to be privately enforced. Appellant KCATA did not appeal from the District Court ruling on that issue, and its Briefs to the Court of Appeals did not address the issue nor cite to *Cort* v. *Ash*. Accordingly, under well settled principles, this Court should not review the matter here. *F. C. C.* v. *National Citizen's Committee for Broadcasting*, 98 S. Ct. 2096, 2118; *Wise* v. *Lipscomb*, 98 S. Ct. 2493 (1978).

Should this Court decide to consider the question, KCATA's description of the issue in its Petition for Certiorari amply illustrates the error of trying to impose *Cort* here. *KCATA* contends ". . . the Union has chosen the wrong Court, under the principles of *Cort* v. *Ash*." (Pet. for Cert., p. 10). *Cort* is not a standard for determining whether a private action belongs in federal Court or state Court. *Cort* decided whether to imply, beyond a federal public regulatory remedy, an additional federal private judicial

11. Since this is an action for injunctive relief enforcing a non-regulatory Act, neither category actually applies. *Piper* v. *Chris-Craft Industries*, 430 U. S. 1 (1977), at 47, n.33. The Court of Appeals for the First Circuit applied an independent analysis to conclude that § 13(c) should be privately enforced and found its conclusion "entirely consistent" with *Cort* v. *Ash*. (Resp. App., p. A43).

remedy. By framing the question as whether to imply a private federal remedy, Petitioner conceals that, under its scheme, the federal statute protecting employees would not be federally enforceable at all. Amicus actually acknowledges this extraordinary result:

> The Congress was willing to require that the Act protect employees from harm arising as a result of the project, but not to go any further. (Am. Cur., p. 28).

As two Courts of Appeals have ruled,[12] the contention that Congress created rights it intended not to be enforced is fatuous.[13]

III. This Court Should Not Review the Eighth Circuit's Rulings on the Merits of This Case.

After ten years of concluding § 13(c) Agreements and receiving the accompanying funds, and after twice proceeding to arbitration as at issue here, KCATA tried to convince the courts that no such obligation existed.[14]

12. The Eighth Circuit, although not presented with the contention that this action must meet the standards of *Cort* v. *Ash*, noted, in affirming the decree, that, of course, the arrangements were enforceable. (A. 40).

13. Insofar as *Cort* would apply, the legislative history readily reveals that, in § 13(c), Congress committed itself "especially" and explicitly to protecting the employees represented here. See, esp., S. Rep. No. 82, 88th Cong., 1st Sess. (1963). The protections of § 13(c), along with many other protections for interests that would feel the impact of massive federal transit funding, form a coherent legislative scheme for controlled social development. The references to two other legislative schemes, the Housing laws and the Interstate Commerce Act, both privately enforced, indicate the Congressional intent, and Congress clearly manifested its intent to preserve the benefits of federally protected collective bargaining relationships, a matter of traditional federal concern. 109 Cong. Rec. 5675. See, also, *Local Division 714* (Resp. App., pp. A45-49).

14. The Brief of Amicus APTA clearly sets forth that the transit authorities determined not to challenge the requirements imposed under UMTA directly, at the time of funding, but rather to make any representations they felt necessary to obtain the federal funds (Am. Cur., pp. 2-4). A direct challenge to the Secretary of Labor

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As a matter of interpretation of the Agreements, the District Court concluded that the obligation to arbitrate is unambiguously provided in the documents and supported by the history of the negotiations. (A. 19).[15] The Court of Appeals similarly ruled based on the documents and negotiating history (A. 39). Thus, neither Court's opinion of what was provided in the Agreements rested for its holding, as Petitioner suggests, on the need for an expansive construction of arbitration obligations.[16]

The Court also properly rejected the contention that a bi-state agency, created by an Act of Congress to be the recipient of federal funds, could retroactively repudiate ten years of commitments to the federal government in satisfaction of a federal spending law on grounds of an amorphous "general" anti-

(Footnote continued from preceding page.)

is very difficult, since, under existing precedent, the Secretary of Labor has broad discretion in demanding adequate arrangements. *Kendler* v. *Wirtz*, 388 F. 2d 381 (3rd Cir. 1968). By signing the Agreements, taking the money and then contending the Agreements are invalid, the transit authorities actually seek to obtain retroactive indirect review of the Secretary's discretion in demanding particular arrangements—review foreclosed to them under the statutory scheme.

15. The Court had before it undisputed evidence of all of the drafts exchanged and written comments made by each party before conclusion of the Agreement and testimony about the one face to face negotiation, culminating in the testimony of the only KCATA witness to the events that he knew the Union thought it had achieved an Agreement providing mandatory arbitration in this circumstance. (R. 51).

16. The KCATA's authorities, holding that interest arbitration does not constitute a mandatory subject for bargaining under the N. L. R. A., 29 U. S. C. § 151 *et seq.*, are simply inapposite to the considerations in these cases, enforcing long-standing arrangements under the mandate of § 13(c). As those cases hold, to qualify as a mandatory subject under N. L. R. A., the matter must bear directly on the substantive terms and conditions of employment of the employees involved. The NLRA itself set up the structure by which the process of bargaining takes place. By contrast, as the language and legislative history of § 13(c) reveal, § 13(c) arrangements are intended to establish the structure and framework of the collective bargaining relationship. The collective bargaining structure established then produces the substantive terms of employment.

arbitration "policy." (A. 14). Among other good reasons, the Court noted that arbitration as a substitute to replace economic warfare in the vital area of urban mass transit was well grounded in public policy (A. 40).[17]

The Courts below also properly rejected KCATA's invitation to create a conflict with the UMTA by stretching examples of some states' common law regarding the limited police power of municipalities to determine the authority of a bi-state transit agency to contract for federal transit funds. The District Court decision, affirmed by the Court of Appeals, that Missouri and Kansas common law do not deprive KCATA of the requisite authority, is an application of local law not normally reviewed by this Court. *Runyon* v. *McGrary*, 427 U. S. 181, 185 (1976), citing *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976).

Moreover, just recently, in dealing with another bi-state agency's authority to make restrictive contracts with private parties, this Court explicitly noted that the bi-state agency's power to so contract had been confirmed. *United States Trust Co.* v. *New Jersey*, 97 S. Ct. 1505 (1977), citing *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 N. Y. 2d 379, 190 N. E. 2d 402, *appeal dism.*, 375 U. S. 78 (1963); *Kheel* v. *Port of New York Authority*, 331 F. Supp. 118 (S. D. N. Y. 1971), *aff'd.*, 457 F. 2d 46 (2nd Cir.) *cert. denied*, 409 U. S. 983 (1972). Thus, KCATA's decisions purporting to limit the authority of subordinate units of municipal government can-

17. It has long been established Transit Union policy to pursue arbitration in this area of public service as an alternative to strikes even against private transit companies. The Constitution and General Laws of the Amalgamated Transit Union provides that no union may strike unless and until it has offered to the employer and the employer has rejected final and binding arbitration of any unsettled dispute. [See, Constitution and General Laws of the Amalgamated Transit Union, § 27.2]. From 1943 to 1968, the collective bargaining agreements between the private predecessor to KCATA and the Union provided for such arbitration (R. 59, 62, Court's Exh. 1).

not dictate the outcome here. As this Court ruled in *Petty* v. *Missouri Bridge Commission*, 359 U. S. 275, 278-279 (1959):

> The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question. . . . Moreover, the meaning of a compact is a question on which this Court has the final say. . . . In making that interpretation we must treat the compact as a living interstate agreement which performs high functions in our federalism, including the operation of vast interstate enterprises.

CONCLUSION

In sum, the transit authorities' efforts to escape the obligations incurred in exchange for millions of federal dollars has been rejected by the unanimous opinions of three Appeals Courts. Those unanimous decisions, well founded in the authority of this Court, and, in this case, in the particular facts involved, should not be further reviewed.

Respectfully submitted,

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Respondent's Appendix

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 77-1981

LOCAL DIVISION 519, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff-Appellee,

vs.

LACROSSE MUNICIPAL TRANSIT UTILITY AND CITY OF LACROSSE, WISCONSIN,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 77 C 292—James E. Doyle, Judge.

ARGUED APRIL 24, 1978—DECIDED OCTOBER 19, 1978

Before SWYGERT and CUMMINGS, *Circuit Judges*, and MARKEY, *Chief Judge*.[1]

SWYGERT, *Circuit Judge*. Defendants-appellants appeal from an order granting a preliminary injunction enforcing a binding arbitration clause in a collective bargaining agreement made pursuant to the provisions of 49 U. S. C. §§ 1601 *et seq*. The questions on appeal are: (1) whether the district court had jurisdiction over this action; (2) whether, if federal jurisdiction exists, the district court should have abstained from exercis-

1. The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

ing it; and (3) whether the district court improvidently issued the preliminary injunction.

From the turn of the century until 1974 intracity transit facilities in the City of LaCrosse, Wisconsin were furnished by the LaCrosse Transit Company, a private enterprise. During the spring of 1974 the City created the Municipal Transit Utility and applied for a capital grant from the Urban Mass Transportation Administration under the Urban Mass Transportation Act of 1964, 49 U. S. C. §§ 1601 *et seq.* The application was principally for the purpose of obtaining funds to purchase the Transit Company. Following the grant of the funds, the purchase was effected and the municipally owed bus system began operations January 1, 1975.

The Transit Company's employees have always been represented by Local Division 519, Amalgamated Transit Union, AFL-CIO, for purposes of collective bargaining, and during the period 1936-1975 they were entitled to the protection of the National Labor Relations Act, 29 U. S. C. §§ 151 *et seq.* As a result of the acquisition of the Transit Company by the Municipal Transit Utility, the employees became public employees and were no longer covered by the National Labor Relations Act. Local 519, however, continued to be their collective bargaining agent. Before the takeover, the Transit Company and the Union were parties to a collective bargaining agreement governing the wages, terms, and working conditions of the employees. The agreement covered the period from March 1973 to June 1975 and established binding arbitration for all differences relating to the terms of employment.[2]

2. Section I—Method of Negotiation

* * * * *

The Company agrees to meet with duly accredited officers and committees of the Union upon all matters relative to wages, hours and working conditions, dealing first through the Superintendent or Operations Manager; then, in case of failure to reach agreement, the matter in dispute shall be taken up with the President of the Company or his accredited representative.

(Footnote continued on next page)

The application for a federal grant was accompanied by an agreement between LaCrosse and the Union executed on April 4, 1974 and was made pursuant to the requirements of § 13(c) of the Urban Mass Transportation Act, 49 U. S. C. § 1609(c).[3]

(Footnote continued from preceding page.)

In case no agreement is reached by the representative of the Company and the Union, the matter in dispute shall be submitted, at the request of either party, to a Board of Arbitration selected in the manner hereinafter specified, and the Company and the Union agree that the decision of such Board shall be final and binding on both parties.

Section II—Method of Arbitration

All differences relating to wages, hours or working conditions of men covered by this agreement which cannot be agreed upon by collective bargaining are to be submitted for decision to an Arbitration Board consisting of Three persons, one chosen by the Company, one chosen by the Union, and two thus selected shall meet daily and select the third. In case of failure to agree on the third person after Ten days, such party shall be selected through a process of elimination, alternately, between the Company and the Union, from a list submitted by the Wisconsin Labor Relations Board. The Board so constituted shall meet within Three days and the decision rendered by this Board shall be binding upon both parties.

Either party desiring to arbitrate any case must notify the other party in writing, and the failure of either party to appoint its own Arbitrator within Ten working days after receipt of same shall forfeit its case.

Each party shall bear the expense of its own Arbitrator, and the expense of the third Arbitrator shall be borne equally by the parties hereto.

3. Section 13(c) provides:

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees termi-

(Footnote continued on next page)

Under that section, a grant applicant is obliged to make "fair and equitable arrangements . . . to protect the interests of employees affected by such assistance" as a condition of the receipt of federal funds. Accordingly, the agreement recognized the Union as the collective bargaining representative of the employees of the Transit Utility. It also guaranteed that the Transit Utility would bargain collectively with Local 519 and would arbitrate labor disputes, including the making or maintaining of collective bargainng agreements.[4] (The 13(c) agreement did

(Footnote continued from preceding page.)

nated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(a)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

4. The 13(c) agreement provides in part:

(2) All rights, privileges, and benefits (including pension rights and benefits) of employees covered by this agreement (including employees having already retired) under existing collective bargaining agreements or otherwise; or under any revision or renewal thereof, shall be preserved and continued: provided, however, that such rights, privileges and benefits not previously vested may be modified by collective bargaining and agreement by the operator of the transit system and the Union to substitute rights, privileges and benefits of equal or greater economic value.

(3) The collective bargaining rights of employees represented by the Union, including the right to arbitrate labor disputes and to maintain union security and checkoff arrangements, as provided by applicable laws, policies and/or existing collective bargaining agreements shall be preserved and continued. The Public Body agrees that it will bargain collectively with the Union or otherwise arrange for the continuation of collective bargaining, and that it will enter into agreements with the Union or arrange for such agreements to be entered into, relative to all subjects which are or may be proper subjects of collective bargaining with a private employer.

* * * * *

(11) In the event of any labor dispute involving the Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after such dispute first arises, such dispute may be submitted at the written request of

(Footnote continued on next page)

not, however, provide a procedure for enforcing these rights.) The agreement was approved by the Secretary of Labor on May 1, 1974 and was incorporated into the capital grant contract between LaCrosse and the United States, which was concluded in November 1974.[5]

(Footnote continued from preceding page.)

either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement, if any, or if none, as hereinafter provided. . . . The term "labor dispute" shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance or pension and retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements and the interpretation and application of such collective bargaining agreements.

* * * * *

(17) If this Project is approved for assistance under the Act, the foregoing terms and conditions shall be made part of the contract of assistance between the Federal Government, and the applicant for federal funds, provided, however, that this agreement shall not merge into the contract of assistance, but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms; nor shall the collective bargaining agreement between the Union and the operator of the transit system merge into this agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

5. The contract reads in pertinent part:

Sec. 5. *Labor Protection*—The Public Body agrees to undertake, carry out, and complete the Project under the terms and conditions determined by the Secretary of Labor to be fair and equitable to protect the interests of employees affected by the Project and meeting the requirements of Section 13(c) of the Act.

These terms and conditions are specified in the letter of certification to the Government from the Department of Labor dated May 1, 1974, which is incorporated herein by reference.

The Municipal Transit Utility of the City of LaCrosse and the Amalgamated Transit Union have executed an agreement, dated April 5, 1974, which provides to members of the Union protections satisfying the requirements of Section 13(c) of the Act.

(Footnote continued on next page)

There remained, however, the original collective bargaining agreement between the Union and the Transit Company which was to run until June 1975. Once the Transit Company was acquired by LaCrosse and became the Municipal Transit Utility, that original agreement would have no effect. In order to cover the period between the acquisition date of January 1, 1975 and the June 1975 expiration date of the original agreement, Local 519 and LaCrosse entered into a "conversion agreement." This agreement set forth the wages, terms, and conditions of employment for the transit employees during the interim period. Notably absent from the conversion agreement was any provision for "interest" arbitration, the arbitration of disputes over the making of subsequent collective bargaining agreements. Once they became public employees, the employees were excluded from coverage by the National Labor Relations Act and instead fell under the provisions of chapter 11 of the Wisconsin Statutes which forbade them to strike.

In June 1975 the conversion agreement expired. When negotiations for a new agreement reached an impasse, Local 519 demanded interest arbitration, invoking the provisions of the 13(c) agreement. LaCrosse disputed the Union's claim, contending that the arbitration of a new collective bargaining agreement should be undertaken pursuant to the conversion agreement. The arbitrators, rejecting LaCrosse's contention, ruled that arbitration of the terms of the new collective bargaining agreement was required by section 11 of the 13(c) agreement. The arbitrators then decided the substantive terms of the dispute between the parties.

(Footnote continued from preceding page.)

Accordingly,

a. The agreement, dated April 5, 1974, is made part of the contract of assistance, by reference; and

b. Employees of the LaCrosse Transit Company, other than those represented by unions, and employees of any other urban mass transportation carrier in the service area of the Project are afforded substantially the same levels of protection as are afforded Union members under the April 5, 1974 agreement.

The contract established by arbitration in 1975 expired June 16, 1977. Negotiations between the parties over the terms of a new contract began in early 1977, but deadlocked June 18, 1977. On July 8 the Union formally requested the Transit Utility to enter into binding arbitration of a new collective bargaining contract under the terms of the 13(c) agreement. The request was rejected by the Transit Utility. At that point the Union filed this action in the district court, alleging that LaCrosse had violated the 13(c) agreement and the grant contract between LaCrosse and the United States. The complaint requested specific performance.

Shortly after the suit was filed the district court entered a preliminary injunction requiring LaCrosse to proceed to arbitration under section 11 of the 13(c) agreement. Thereafter the defendants filed their motion to dismiss for lack of jurisdiction or to abstain. The motion was denied. At the same time the court stayed the preliminary injunction to permit the defendants to petition this court for a stay. On February 14, 1978 this court denied a stay of the preliminary injunction. By timely notice, the defendants have prosecuted this appeal.

I

A.

The primary question is whether the district court had subject matter jurisdiction under 28 U. S. C. § 1331 to consider this suit. All other questions are subordinate, including what remedy, if any, the Union might assert to enforce its alleged right to interest arbitration. The Supreme Court's decision in *Bell* v. *Hood*, 327 U. S. 678, 682 (1946), requires this approach: "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."

The test for determining federal subject matter jurisdiction was correctly enunciated by Judge Doyle in his memorandum opinion, reported at 445 F. Supp. 798, 804 (W. D. Wis. 1978):

> A case "arises under" the Constitution or the laws of the United States when its decision depends upon the interpretation of the Constitution or federal law, *Cohens* v. *Virginia*, 6 Wheat. 264 [19 U.S. 264], 376 (1821); that is, when the action may be defeated by one construction of law and sustained by the opposite construction. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 22 U.S. 738, 821-22 (1824); *Gully* v. *First National Bank*, 299 U.S. 109, 112 (1936); *Goldman* v. *First Savings and Loan Ass'n of Wilmette*, 518 F.2d 1247, 1251 n. 7 (7th Cir. 1975). For the purpose of federal jurisdiction, an "action" is defined in terms of the right asserted, not the remedy sought. *Cohens* v. *Virginia*, *supra* at 379. The right asserted, on which federal jurisdiction depends, must be an essential element of the plaintiff's cause of action. *Gully* v. *First National Bank*, *supra*; *Phillips Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 127 (1974).

Mr. Justice Cardozo explicated the test in *Gully* v. *First National Bank*, *supra:* "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." 299 U.S. at 112 (citations omitted). Accordingly, we must inquire whether the source of an essential element of the Union's cause of action for breach of contract originates in a law of the United States.

The district court found two such elements in the Urban Mass Transportation Act: (1) a 13(c) agreement was required by § 13(c) of the Act as a condition to LaCrosse's receipt of the grant of public funds and (2) in light of the alleged circumstances, § 13(c) required that the agreement include an interest arbitration provision which was to remain in effect during the life

of the capital grant contract. When the totality of the allegations of the complaint are considered, the Union's cause of action contains the necessary elements for federal question jurisdiction irrespective of whether those allegations are bisected according to the analysis undertaken by the district court.

Congress, exercising its spending power, enacted the Urban Mass Transportation Act, which authorized the granting to public bodies, such as a municipality, of federal funds for the acquisition, construction, and improvement of mass transportation facilities. As a condition to a grant, the Act requires a contract between the United States and the public body, containing various obligations on the part of the recipient. Specifically, § 13(c) provides that, "It shall be a condition of any assistance . . . that fair and equitable arrangements are made [between the recipient and its employees], as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." The section then provides that these protective arrangements shall include provisions of the preservation of employee rights under existing collective bargaining agreements, the continuation of such agreements, and the protection of employees against a worsening of their position. Finally, § 13(c) provides that the contract for the grant shall specify the terms and conditions of the protective arrangements.

Because § 13(c) mandates a "fair and equitable arrangement" that meets the approval of the Secretary of Labor, the exact and concrete terms of an arrangement define the more general requirements of the statutory provision. The approval of the Secretary stamps the 13(c) agreement as something more than a mere private contract formulated under the aegis of a federal statute. Instead, the contract is infused with statutory prerequisites. Clearly then, the terms written into a 13(c) agreement are grounded in federal law. The validity of this view becomes even more clear when we consider that the 13(c) agreement is a part of an overall contract which is itself mandated by the Act. As we have just indicated, the Urban Mass

Transportation Act mandates the making of a 13(c) agreement containing exact, fair, and equitable arrangements that have the approval of the Secretary of Labor. But the mandate does not cease when the agreement is reached and approved; perforce it requires the parties to abide by the agreement. Therefore, if enforcement is sought, federal law questions do not "lurk" in the background, as LaCrosse contends; they become the very basis for adjudication. Ineluctably, questions concerning the validity of a contract imposed by the Act and any rights flowing from the contract require application of federal law. The situation here is fundamentally different from that where an order of a federal regulatory agency authorizing the making of a private contract is solely permissive. *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F. 2d 424 (2d Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966). In contrast, a 13(c) agreement is so intertwined with the federal statutory scheme that § 1331 subject matter jurisdiction must necessarily arise.

International Association of Machinists v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), is direct authority for our holding. In that case a labor union filed a suit in federal court to enforce an award made by an airline board of adjustment. The board had been established by an agreement between the airline company and a labor union pursuant to section 204 of the Railway Labor Act, 45 U. S. C. § 184, which required the creation of the board by private contract. According to the Act the award of the board was final and binding. 45 U. S. C. § 153. The Court held that the action to enforce the award arose under federal law.

As Judge Doyle noted, central to the Court's holding was its observation that the duty to create an adjustment board "was more than a casual suggestion to the air industry." 372 U. S. at 686. The Court explained:

> Although the system boards were expected to be temporary arrangements, we cannot believe that Congress intended an interim period of confusion and chaos or meant to leave the establishment of the Boards to the whim of the parties. Instead, it intended the statutory command to be legally enforceable in the courts and the boards to be organized and operated consistent with the purposes of the Act.
>
> We have held other duties imposed upon the carriers and their employees by the Railway Labor Act binding and their breach redressable in the federal courts, such as the duty to bargain, *Virginian R. Co.* v. *System Federation*, 300 U.S. 515, 545, and the duty of a certified bargaining representative to represent all members of the craft without discrimination. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192. We take a similar view of the duty to establish adjustment boards under § 204. *Id.* at 690.

The Court, then, in language peculiarly apposite to the question before us, ruled that a section 204 contract and its enforceability were governed by federal law:

> The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a § 204 contract is enforceable, it is because of congressional sanction: "[T]he federal statute is the source of the power and authority. . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction. . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it. . . ." *Railway Dept.* v. *Hanson*, 351 U.S. 225, 232. This is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts. *Id.* at 692.

The Court emphasized the point:

> The contract of the parties here was executed under § 204 and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by

> federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires its compliance. *Id.* at 695.

Thus, *Central Airlines* stands for the proposition that an action to enforce a contract mandated by federal statute arises under federal law.

In an attempt to distinguish this case, LaCrosse argues that "the assumption of federal jurisdiction" in *Central Airlines* "was compelled by the manifest need of the subject matter for national decisional uniformity." Brief for Defendant at 18. The argument continues: "Unlike the situation in *Central Airlines* no system of dispute resolution has been prescribed by Congress to govern the parties' relations in this case. Nor does the Urban Mass Transportation Act contain any suggestion that the 'needs of the subject matter manifestly call for uniformity'. *Id.* at 691-692." Brief for Defendant at 20, 21.

The answer to LaCrosse's argument is that the differences between the Railway Labor Act and the Urban Mass Transportation Act relate to different aspects of employer-employee relations. The former relates primarily to the resolution of labor disputes in the national railroad industry. The latter, although having for its main purpose the grant of public funds for the extension and improvement of urban transportation systems, provides for the protection and preservation of collective bargaining rights of transit employees.[6] Given this difference, both acts, nonetheless, adopt a substantially similar method to obtain

6. Although the Urban Mass Transportation Act's major concern is with the strengthening of mass transportation systems, 49 U. S. C. §§ 1601, 1601a, 1601b, both the legislative history and the Act itself also indicate a definite congressional concern for the economic interests of transit workers affected by the federal grant program. Congress recognized that upon becoming public employees, the workers might well suffer a worsening of their positions. To prevent that deterioration, the Act requires the making of arrangements to safeguard employee rights: a 13(c) agreement.

their respective objectives: a contract between the parties infused with statutory prerequisites.

As for the needs of the "subject matter uniformity," those needs are identical for the fulfillment of the respective purposes of the two Acts. In *Central Airlines*, the Court expressed it thusly:

> It is therefore the statute and the federal law which must determine whether the contractual arrangements made by the parties are sufficient to discharge the mandate of § 204 and are consistent with the Act and its purposes. It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. *Central Airlines, supra* at 690-91.

We need only substitute "§ 13(c)" for "§ 204" in the above quotation to illuminate the point.

The holding in *Central Airlines* has been explicitly recognized by this Court. *Brotherhood of Railway Clerks* v. *Special Board of Adjustment No. 605*, 410 F. 2d 520 (7th Cir. 1969), *overruled on other grounds, Merchants Dispatch Transportation Corp.* v. *Systems Federation*, 551 F. 2d 144 (7th Cir. 1977). In *Brotherhood of Railway Clerks*, the plaintiff union contended that the federal court possessed §§ 1331 and 1337 jurisdiction to review the award of a Special Board of Adjustment established by contract under a section of the Railway Labor Act which permitted such contractual arrangements for the resolution of grievance-type disputes. We rejected the plaintiff's contention, saying:

> That this case is inapplicable to the dispute before us is apparent if we keep in mind the fact that Board No. 605 is a contractual and not a statutory board. In *Central Airlines*,

> the parties agreed to establish a system board of adjustment to resolve grievance disputes. The Supreme Court, in ruling that awards of an airline system board of adjustment can be enforced in a federal court, made it clear that agreements to submit matters to these boards were not permissible but mandatory.

410 F. 2d at 523. The holding in *Brotherhood of Railway Clerks* was overruled by this court in *Merchants Dispatch*. We continued, however, to recognize the validity of *Central Airlines* as authority for our decision. 551 F. 2d at 151-52.

This court's decision in *McDaniel* v. *University of Chicago*, 512 F. 2d 583 (7th Cir. 1975), also supports our present holding. In that case we ruled that federal question jurisdiction existed to enforce the prevailing wage requirements of the Davis-Bacon Act, 40 U. S. C. § 276a-2(b). That statute makes it a condition to the receipt of federal funds that the recipient contract with the federal government to pay laborers the prevailing wage on construction projects. Chief Judge Fairchild wrote:

> We therefore conclude that plaintiff's complaint, in that it sought to enforce defendant's contractual commitment to pay "prevailing" wages as determined by the Secretary of Labor, stated a cause of action under the Davis-Bacon Act for which relief could be granted and that subject matter jurisdiction was properly based upon 28 U. S. C. § 1337.

Id. at 588. On remand we expressly adhered to our decision on the jurisdictional question. 548 F. 2d at 695.

The Eighth Circuit's decision in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western RR Co.*, 314 F. 2d 424 (8th Cir. 1963), is also pertinent to our holding. As Judge Doyle noted, the analogy of 13(c) of the Urban Mass Transportation Act and § 5(a)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f), is "obvious." A comparison of the two sections reveals a striking similarity. Apparently Congress patterned § 13(c) after § 5(2)(f). Furthermore, in *Norfolk & Western RR Co.* v. *Nemitz*, 404 U. S. 37 (1971), the Supreme Court implicitly ruled that the exercise of federal court jurisdiction was warranted in enforcing § 5(2)(f) protective agreements.

Lastly, we note that the Eighth Circuit has very recently decided the identical question that is before us, ruling that subject matter jurisdiction under 28 U. S. C. § 1331 is present. *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, ... F. 2d ....., No. 78-1255 (8th Cir., August 21, 1978).

B.

LaCrosse contends that even if the Union's case is one that "arises under" the laws of the United States it should be dismissed on the grounds that (1) the Union failed to allege in its complaint the requisite amount in controversy in order to confer jurisdiction under 28 U. S. C. § 1331 and (2) the matter in dispute does not exceed the sum of $10,000, exclusive of interest and costs.

The Union failed to plead the jurisdictional fact of the amount in controversy; however, in the absence of a specific allegation, this court may infer the required pecuniary value from the facts stated in the Union's complaint. *Giancana* v. *Johnson*, 335 F. 2d 366 (7th Cir. 1964), *cert. denied*, 379 U. S. 1001 (1965).

With respect to its second contention, LaCrosse urges that the case be dismissed because the Union is unable to establish in good faith that the matter in controversy exceeds the value of $10,000. The test for determining the minimal amount was stated in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.* 303 U. S. 283, 288-90 (1938). There the Supreme Court ruled: "[I]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." Absolute certainty that the requisite amount is satisfied need not be met; a present probability is sufficient. *Scherr* v. *Volpe*, 336 F. Supp. 882, 885 (W. D. Wis. 1971), *aff'd*, 466 F. 2d 1027 (7th Cir. 1972). Applying the legal certainty test to a case seeking equitable relief, the jurisdictional amount is to be measured by the value to the complainant of the right which it

seeks to protect. *City of Milwaukee* v. *Saxbe*, 546 F. 2d 693, 702 (7th Cir. 1976).

The district court resolved the issue of jurisdictional amount by relying on the claims of the Union's members. *See Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333 (1977). Accordingly, it determined that the value of a new collective bargaining agreement, at least for some of the individual union members, would exceed $10,000. It was not necessary, however, for the district court to resort to the claims of the individual union members to meet the requisite amount in controversy. The essential object sought to be protected by the Union in this action is the right to an arbitration award when a new contract cannot be reached through bargaining. That right, therefore, is the matter in dispute and its value determines the jurisdictional amount. *See Davenport* v. *Procter & Gamble Mfg. Co.*, 241 F. 2d 511, 514 (1957); 2 J. Moore, *Federal Practice* ¶ 0.92[5] at 880 (2d ed. 1972). There is no difficulty translating this right into pecuniary terms. The Union is seeking a new collective bargaining agreement for thirty-two employees. It is certain from the facts in the case that a new contract will not be valued at $10,000 or less. It may be readily inferred that past collective bargaining agreements entered into by the Union as representative of these employees involved sums which far exceeded the required jurisdictional amount.

Our determination that the value of the arbitration award of a new collective bargaining agreement may satisfy the $10,000 amount-in-controversy requirement of § 1331 is not an aggregation of the individual claims of the Union members. We agree with the Union that it has an economic interest in a new collective bargaining contract apart from that of the members' interest in the agreement's provisions concerning wages and terms and conditions of employment. *See Smith* v. *Evening News Ass'n*, 371 U. S. 195, 200 (1962); *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1945); *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U. S. 175 (1967). Accordingly, the district court was correct in not dismissing the complaint for insufficiency of the amount in controversy.

C.

We turn to the question of whether the Union is entitled to a remedy in federal court. It would seem axiomatic that there is a private right of action to enforce the 13(c) agreement by injunctive relief. By definition a contract is a promise enforceable by law. 1 A. Corbin, *Contracts* § 3 (1963). We agree with Judge Doyle's statement: "Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise. Because the contracts were to be enforceable, it follows that they were to be enforced at the instance of the parties to the contracts." 445 F. Supp. at 811.

Based upon this premise, it follows that since the test for federal question jurisdiction has been met the remedy lies in federal court. The statutory scheme outlined in the Urban Mass Transportation Act and the policy underlying § 13(c) of the Act implies a federal private remedy. Support for this holding is found in *Central Airlines*. There the Court implicitly recognized the existence of a federal private remedy. Also supportive is our statement in *McDaniel II:* "The policy behind the remedy itself, a private suit, is not really in question." 548 F. 2d at 684. Because of our holding, an analysis under *Cort* v. *Ash*, 422 U. S. 66 (1975), is unnecessary. That case is inapposite.

II

Finding jurisdiction, we consider the issue of whether the district court as a matter of equitable discretion should have declined to entertain the suit. We hold that the application of the abstention doctrine is not appropriate in this case.

We begin with the rule that "[t]he doctrine of abstention, under which a District Court may decline to exercise or postpone

the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188-89 (1959), as cited in *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813 (1976). LaCrosse contends that this case is an exception to the general rule. In particular, it asserts that federal court action would needlessly interfere with the state's administration of its own affairs and disrupt Wisconsin's efforts to establish a coherent policy concerning the relationship between the state and its public employees. *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943); *Alabama Public Service Comm'n* v. *Southern Ry. Co.*, 341 U. S. 341 (1951); and *Kelly Services, Inc.* v. *Johnson*, 542 F. 2d 31 (7th Cir. 1976).

The present case does not fall within the category of *Burford*-type abstention upon which LaCrosse relies. The Union seeks to enforce a federal right to interest arbitration. There is no complex issue of local law involved in this case which compels the Union to take advantage of Wisconsin's procedural opportunities. Additionally, the fact that the interest arbitration required in this case may conflict with similar rights provided for under the Wisconsin Municipal Employment Relations Law does not, without more, require abstention. *See Colorado River Water Conservation Dist.* v. *United States*, *supra* at 816. We conclude, therefore, that the district court did not abuse its discretion by refusing to abstain from consideration of this case.

III

The remaining issue, whether the district court abused its discretion by granting a preliminary injunction compelling

LaCrosse to proceed to arbitration, may be disposed of summarily.

The standard for the appellate test of a preliminary injunction was set forth by this court in *Scherr* v. *Volpe*, 466 F. 2d 1027, 1030 (7th Cir. 1972):

> We start with the observation that our function in reviewing the entry of a preliminary injunction is a limited one. Appellate tribunals may set aside the issuance of such injunctions only where it can be said that the discretion vested in the district court with respect to these matters has been improvidently exercised . . . .

466 F. 2d at 1030. Absent a clear abuse of discretion, the district court's process of balancing the probabilities of ultimate success at the final hearing with the consequences of immediate irreparable injury which could possibly result from the denial of preliminary relief will not be disrupted on appeal. *Id.* at 1030.

We have previously indicated the four prerequisites against which the discretion exercised by the district court must be measured: (1) the plaintiff has at least a reasonable likelihood of success on the merits; (2) the plaintiff has no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (3) the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; and (4) the granting of the preliminary injunction will not disserve the public interest. *Fox Valley Harvestore* v. *A. O. Smith Harvestore Prod., Inc.*, 545 F. 2d 1096, 1097 (7th Cir. 1976).

The district court found on the basis of the facts before it that the Union had a reasonable likelihood of success on the merits. This criterion is "necessarily a somewhat flexible standard that allows the chancellor room for the exercise of judgment." *Mullis* v. *Arco Petroleum Corp.*, 502 F. 2d 290, 293 (7th Cir. 1974). The factual background of this case is virually undisputed. As to the legal issues involved, we cannot say that the district court abused its discretion in finding that the

Union enjoyed a "good chance" to succeed ultimately in this case.

Turning to the second requirement, the finding of irreparable injury to the Union if LaCrosse did not proceed to compulsory arbitration cannot be considered an abuse of discretion. At the time of the lawsuit, the employees were working without a collective bargaining agreement and negotiations were at an impasse. Similarly, we are convinced that the district court did not abuse its discretion in ruling on the other prerequisites to the issuance of a preliminary injunction.

Although we believe that an evidentiary hearing would be better practice when district courts are asked to grant interlocutory relief, we do not perceive any procedural defect here. When considering the preliminary injunction, the district court had before it the Union's verified complaint and motion for a preliminary injunction, both of which were accompanied by exhibits. LaCrosse's answer was before the court and both parties filed memoranda concerning the Union's motion. LaCrosse defended on the grounds that the Union waived its rights, but failed to present any evidence on the waiver issue other than the conversion agreement. It chose not to file affidavits contradicting the matters set forth in the affidavit proffered by the Union, despite the instructions of the district court. Accordingly, LaCrosse's contention on appeal that the district court abused its discretion in issuing injunctive relief will not be accepted.

The district court's order granting the preliminary injunction is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 78-1077.

LOCAL DIVISION NO. 714,
AMALGAMATED TRANSIT UNION, AFL-CIO,
AN UNINCORPORATED ASSOCIATION,

Plaintiff, Appellant,

vs.

GREATER PORTLAND TRANSIT DISTRICT
OF PORTLAND, MAINE, A BODY POLITIC,

Defendant, Appellee.

Appeal from the United States District Court
for the District of Maine.

[Hon. Edward T. Gignoux, *U. S. District Judge.*]

Before Coffin, *Chief Judge,*
Campbell and Bownes, *Circuit Judges.*

Lawrence J. Zuckerman, with whom ***Earle W. Putnam,*** was on brief, for appellant.

Brenda T. Piampiano, with whom ***F. Paul Frinsko,*** and ***Bernstein, Shur, Sawyer & Nelson,*** were on brief, for appellee.

November 15, 1978

CAMPBELL, *Circuit Judge*. This appeal concerns an action brought in the District Court for the District of Maine by Local Division 714, Amalgamated Transit Union (the Union) seeking a declaratory judgment and injunction against the Greater Portland Transit District (the District) for its refusal to submit the parties' dispute regarding terms of a new collective bargaining agreement to binding arbitration. Arbitration of the terms of a new contract—known as "interest arbitration"—is alleged to be required by an agreement the parties entered into pursuant to § 13(c) of the Urban Mass Transportation Act, 49 U. S. C. § 1609(c) (UMTA). The court below, ruling from the bench dismissed the Union's suit for lack of subject matter jurisdiction, and the Union has appealed. We are thus faced with the narrow but important question of whether the federal courts are vested with the authority to hear labor disputes of this type between the recipients of UMTA grants and their employees.

I.

Under the UMTA, state and local agencies may obtain federal financial assistance for the providing of mass transportation services in urban areas. 49 U. S. C. § 1602. Section 13(c) of the Act, 49 U. S. C. § 1609(c), establishes as "a condition of any assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." The section then proceeds to specify what the labor protective arrangements are to accomplish, including the preservation of existing collective bargaining rights. Finally, § 13(c) directs that the "terms and conditions of the protective arrangements" shall be specified in the financial assistance contract itself—viz. the contract between the local authority and federal government.[1] In practice,

1. Section 13(c) provides in full:

"(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the

(Footnote continued on next page)

the statute seems to have been read as leaving to the applicant for federal assistance and its employees, or their bargaining representative, the negotiating of a written agreement (called a § 13(c) agreement) containing the precise terms of mutually satisfactory protective arrangements, followed by approval of that agreement by the Secretary of Labor.

The case before us arises out of several financial assistance contracts between the District and the federal government. The District, a Maine state agency, has as its purpose the providing of motor vehicle mass transportation in the greater Portland area. From 1970 until early 1973, the District owned the office and garage facilities where buses were parked and maintained, but leased the facilities to the Greater Portland Transit Company, a private corporation, which operated the transportation services. Before and during this period, the Transit Company's employees were protected by the Labor Management Relations Act, 29 U. S. C. §§ 141-87, and the Union and the Transit Company were parties to successive collective bargaining agreements.

In late 1972, the District arranged to purchase the Transit Company. The District entered into a Capital Grant Contract

(Footnote continued from preceding page.)

interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the contnuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priorty of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

(Grant No. 1) with the United States, pursuant to the UMTA, to receive federal funds for the project. The "project" was defined as the purchase of the Transit Company's assets, 15 new buses, and 15 locked registering fare boxes. The grant contract obliged the District to complete the project under the labor protective provisions of a § 13(c) agreement between the District and the Union dated December 8, 1972 ("1972 § 13(c) Agreement"), which the Secretary of Labor had approved; these provisions were incorporated by reference into the grant contract. The § 13(c) agreement provided in part for binding arbitration of labor disputes, including interest arbitration of the terms of new collective bargaining agreements.[2]

The District after receiving funding under the Act purchased the Transit Company's assets on January 1, 1973. Pursuant to the 1972 § 13(c) Agreement, the District succeeded to the Company's obligations under the then-existing collective bargaining agreement, which was due to terminate on December 31, 1973. When the agreement terminated, the Union and the District arrived at a new collective bargaining agreement apparently by utilizing, after impasse had been reached, the dispute settlement procedures provided by the Maine Public Employees Relations Law, 26 M. R. S. A. §§ 961 *et seq.*, rather than the binding interest arbitration provided by the 1972 § 13(c) Agreement. One procedure used was fact-finding in which both the District and the Union participated. The resulting 1974 collective bargaining agreement, as had the previous collective bargaining agreements, provided for non-interest arbitration but explicitly denied any requirement of interest arbitration. This

2. Interest arbitration differs from the arbitration of grievances in that the latter calls for the arbitrator merely to "apply the contract" to the facts of a particular situation, while the former leaves to the arbitrator the determining of the terms and conditions of the next labor contract between the parties. Section 13(c) does not expressly require that labor protective arrangements provide for interest arbitration in order to conform to statutory norms; and it is not represented that the Secretary of Labor has made any such requirement as a precondition to his approval.

collective bargaining agreement had an expiration date of December 31, 1976.

In February 1975, the District and the Union entered into a second § 13(c) agreement ("1975 § 13(c) Agreement"), in relation to an application by the District for UMTA funding for the purchase of 35 new buses and fare boxes. This agreement again mandated binding interest arbitration. The agreement provided further that it would be "independently binding and enforceable by and upon the parties thereto . . . ." The Secretary of Labor approved this 1975 § 13(c) Agreement, and its employee protections became part of a Capital Grant Contract (Grant No. 2) with the United States for funding for the purchase of 39 new buses and fare boxes, which was executed in November 1975. At the same time, the District and the United States entered into an Operating Assistance Grant Contract (Grant No. 3) covering the District's operating expenses for calendar year 1975.

A year later, in November 1976, the District became a party to another § 13(c) agreement. This was the "National § 13(c) Agreement," which had been executed by the American Public Transit Association and the Transit Employee Labor Organizations in July 1975. The District became a party thereto by notifying the appropriate parties of its desire to have that agreement apply to the District's grants of operating assistance under the UMTA. The District requested specifically that "all applications submitted for Federal Operating Assistance under Section 5 and 3(H) of the Act for the period November 26, 1974 through September 30, 1977 *not heretofore certified* by the Department of Labor be certified on the basis of the [National § 13(c) Agreement]." The Secretary of Labor certified the National § 13(c) Agreement for the District and the Union in November 1976. As the District's only previous application for operating assistance (Grant No. 3) already had been certified by the Secretary, however, the National § 13(c) Agreement apparently did not become part of a contract of assistance until

April 1977. At that time the District and the United States entered into an Operating Assistance Contract (Grant No. 4) to cover the District's operating expenses for calendar year 1976. The National § 13(c) Agreement provided for binding non-interest arbitration, but did not itself provide for interest arbitration. Arguably, however, it incorporated the interest arbitration requirements of the prior § 13(c) agreements.

After the National § 13(c) Agreement was executed but before it was incorporated into the Grant No. 4 contract, the 1974 collective bargaining agreement terminated and the instant litigation arose. During the two months prior to the December 31, 1976 termination date, the District and the Union negotiated toward a new collective bargaining agreement. Early in January 1977, the negotiations reached impasse, and the parties were unable to agree as to what was the appropriate dispute settlement procedure to follow. The Union requested binding interest arbitration pursuant to the 1975 § 13(c) Agreement. The District refused, and instead had a mediator appointed by the Maine Labor Relations Board.

In March of 1977, the Union filed this complaint in the United States District Court for the District of Maine, asking for a declaration and injunction requiring the District to submit the disputed terms of the new collective bargaining agreement to binding interest arbitration pursuant to the 1975 § 13(c) Agreement. The complaint contains four counts: (1) that the District's refusal to arbitrate was a breach of the 1975 § 13(c) Agreement and thereby did not comply with § 13(c) of the UMTA; (2) that the District's refusal to arbitrate violated Maine law; (3) that the District's refusal violated the National § 13(c) Agreement; and (4) that the District violated the 1974 collective bargaining agreement by refusing to bargain in good faith. The Union premised jurisdiction on 28 U. S. C. §§ 1331 and 1337. The District's answer denied that the 1975 § 13(c) Agreement was in "full force and effect," denied that it was an industry affecting commerce (as required by § 1337), alleged as a defense

that it was a quasi-municipal corporation and a political subdivision of the State of Maine, and asserted that the court lacked subject matter jurisdiction.

Since this appeal does not deal with the merits of the present dispute, we need not delve deeply into the parties' substantive contentions. The Union, suffice to say, feels the 1975 § 13(c) Agreement, mandating interest arbitration, is controlling and was operable in late 1976 and early 1977 because the project covered by Grant No. 2, the purchase of 39 new buses and fare boxes, was not yet completed. This view arguably aligns with the apparent intention of Grant Contract No. 2 that the 1975 § 13(c) Agreement would be in effect until the project, the purchase, was finished. The Union argues that the incorporation of the National § 13(c) Agreement into the subsequent assistance contract was not meant to preempt the prior § 13(c) agreement. The District, on the other hand, argues that the parties never meant to require binding interest arbitration. It points to the provision of the 1974 collective bargaining agreement expressly precluding interest arbitration, as well as to the fact that the parties utilized Maine's dispute settlement procedures in their 1974 collective bargaining. The District maintains that it was told and believed that the National § 13(c) Agreement superseded the 1975 § 13(c) Agreement. Further, it argues that because the employees have not been adversely affected by the federal grants, no contract rights ever arose under the 1975 § 13(c) Agreement. *See* 49 U. S. C. § 1609(c). Finally, the District challenges the enforceability of the 1975 § 13(c) Agreement's interest arbitration requirement on the ground that it lacked authority ever to agree to any such requirement.

The district court's order dismissing the suit for lack of subject matter jurisdiction was in response to the District's motion to dismiss both on that ground and for failure of the complaint to state a claim upon which relief could be granted. We address

both grounds herein, both having been presented below. We turn first to the question of jurisdiction.

II.

The Union asserts the existence of federal jurisdiction under 28 U. S. C. §§ 1331 and 1337. Both of these provisions require that the action "arise under" federal law, and it is well-established that the "arising under" test is the same for either section. *Jersey Central Power & Light Co.* v. *Local Unions, IBEW*, 508 F. 2d 687, 699 n.34 (3d Cir. 1975), *cert. denied*, 425 U. S. 998 (1976); *see Peyton* v. *Railway Express Agency, Inc.*, 316 U. S. 350, 353 (1942). In *Gully* v. *First National Bank*, 299 U. S. 109, 112-13 (1936), the Supreme Court said,

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U. S. 248, 257; *First National Bank* v. *Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid; King County* v. *Seattle School District*, 263 U. S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, much exist with reference thereto (*New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Joy* v. *St. Louis*, 201 U. S. 332; *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454; *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co., supra.*"

For a recent case reaffirming these principles, *see Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U. S. 125 (1974). *See generally* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3562 (1975). The essential inquiry is thus whether the complaint, on its face, alleges a cause of action based on a right created by federal law, and whether the construction given to the federal law will be pivotal in the particular case.

Bell v. *Hood*, 327 U. S. 678 (1946), had more to say about "arising under" jurisdiction. *Bell* involved an action for damages brought by private parties against FBI agents for alleged violations of fourth and fifth amendment rights. The lower courts dismissed for want of federal jurisdiction. The Supreme Court reversed, holding that because the complaint squarely sought recovery on the ground that the agents violated the Constitution, federal question jurisdiction existed regardless of whether or not there was a federal cause of action or whether the complaint also alleged a state law claim.[3] The Court stated the jurisdictional rule as follows:

> "[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions . . . , must entertain the suit. . . .
>
> ". . . The . . . exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."

Id. at 681-83. The Court added that if the complaint failed to state a proper cause of action, the correct disposition would

3. The *Bell* Court concluded that the claim for damages based on fourth and fifth amendment violations sufficed to establish federal question jurisdiction, even though *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), had not yet been decided.

not be dismissal for want of subject matter jurisdiction. Rather, a judgment on the merits in the form of a dismissal for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), would be appropriate. 327 U. S. at 682; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950).[4]

To apply these principles here, we first have to determine the theory of recovery set out in the complaint. Three interpretations can be advanced. The narrowest would be that the complaint shows, at most, a violation of a private contractual agreement between the Union and the District. The broadest would be that the complaint shows a violation of § 13(c) on the theory that § 13(c) commands interest arbitration—a command the District ignored. A middle ground would be that the complaint shows a § 13(c) violation, not because § 13(c) requires interest arbitration, but because § 13(c), as a matter of clear inference, directs compliance with the mandated labor protective arrangements and implies a federal remedy for breach thereof in favor of those employees for whose benefit § 13(c) was enacted.

The district court read the complaint narrowly, as setting forth only a violation of private contract, rather than a violation of § 13(c). It reasoned that even though § 13(c) was "the principal factor leading the parties to enter into the agreement," the suit was on the contract, not the federal statute. On this premise, the complaint would not be viewed to be "so drawn as to seek recovery directly under the . . . laws of the United States." *Bell* v. *Hood*, 327 U. S. at 681.

The district court further reasoned that any right the Union had to interest arbitration stemmed from the § 13(c) agreement, not § 13(c) itself. It thus rejected what we have termed the "broadest" construction of the complaint, namely, that relief is

4. On remand, the district court in *Bell* v. *Hood* took jurisdiction but dismissed the suit for failure to state a federal cause of action. 71 F. Supp. 813, 820-21 (S. D. Cal. 1947).

justified because § 13(c) itself commands interest arbitration. This latter construction was accepted by the district court in *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, 445 F. Supp. 798 (W. D. Wis. 1978), *aff'd*, No. 77-1981 (7th Cir. Oct. 19, 1978). The *LaCrosse* district court credited the allegation that § 13(c) itself commanded interest arbitration under the circumstances, and on that basis found federal question jurisdiction to be present. This interpretation seems to us somewhat questionable. The statute does not mention interest arbitration, and while an interest arbitration provision in a § 13(c) agreement may possibly be seen as carrying out one or more of the five substantive labor protections guaranteed in § 13(c),[5] we are unable to translate any of these into a hard and fast command that interest arbitration be provided. In any event, we do not understand the present complaint to allege that the refusal to engage in interest arbitration constitutes, *per se*, a direct violation of the federal statute. Hence we agree with the district court that federal jurisdiction is not to be premised on this construction.

We think, however, that the district court erred in failing to deal with the third, middle-ground, construction of the complaint. In its complaint, the Union expressly alleged that breach of the § 13(c) agreement constituted noncompliance with § 13(c) of the UMTA. The Union thus advanced the theory that breach of the terms of a labor protective arrangement made pursuant to the command of § 13(c) contravened that statute. The Union contends that by making it a condition of financial

5. The "protective arrangements" mandated in § 13(c), "shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs." *See* note 1, *supra*, for full text of § 13(c).

assistance that the District enter into fair and equitable arrangements as determined by the Secretary of Labor, and by commanding that the terms and conditions of such arrangements become part of the grant contract, Congress implicitly mandated both compliance with those arrangements and a federal remedy for their breach.

We think this reading of the complaint is compelled by its language, and that it precludes a ruling of no federal jurisdiction. *Accord, Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981, slip op. at 10 (7th Cir. Oct. 19, 1978); *Division 1207, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, No. 78-1255, slip op. at 11-13 (8th Cir. Aug. 21, 1978). Jurisdiction does not even require that the complaint necessarily state a valid claim upon which relief can be granted; all that is required is that the complaint is "so drawn as to seek recovery directly under the . . . laws of the United States . . . ." *Bell* v. *Hood*, 327 U. S. at 681. As the present complaint was so drawn, it states a claim arising under federal law unless the assertion that rights under § 13(c) were denied by the District's refusal to arbitrate either "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction," or "is wholly insubstantial and frivolous." *Id.* at 682-83.

Plainly the assertion of a § 13(c) violation is not "immaterial": the agreement for whose breach the Union seeks relief came into being because of § 13(c). Nor is it patently frivolous to contend that breach of labor protective arrangements formed under § 13(c) violates § 13(c) itself, or gives rise to a federal remedy. It is true that three district courts have found subject matter jurisdiction lacking in similar settings on essentially this basis, although they did not couch their determination in *Bell's* "wholly insubstantial and frivolous" phraseology. *See Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, No. C-76-104-E (W. D. Tenn. Dec. 23, 1977), *appeal docketed*, No. 78-1185 (6th Cir. May 16, 1978; *Division*

580, Amalgamated Transit Union v. *Central New York Regional Transportation Authority*, No. 77-CV-45 (N. D. N. Y. Oct. 19, 1977), *vacated as moot*, No. 77-7546 (2d Cir. June 7, 1978); *Metropolitan Atlanta Rapid Transit Authority* v. *Local Division 732, Amalgamated Transit Union*, No. 18429 (N. D. Ga. July 11, 1973). Each of those courts acknowledged the complaint before it to claim that the alleged violation of the § 13(c) labor protective agreement constituted a violation of § 13(c) itself, but denied federal question jurisdiction because it saw no federal issue involved. But, two federal issues obviously were raised: first, whether breach of the terms of labor protective arrangements made under § 13(c) violates § 13(c), and second, whether there is a federal cause of action for such a breach. The *Jackson, Atlanta,* and *Central New York* courts evidently felt those issues to be so insubstantial as to require disposition on jurisdictional grounds. The district court's decision below also can be viewed this way, rather than as having narrowly interpreted the complaint not to allege a violation of § 13(c). We cannot, however, accept the conclusion of frivolity. Two circuit courts, in the *Kansas City* and *LaCrosse* cases, *supra,* have recently found federal jurisdiction in circumstances very similar to this; and, as our later analysis indicates, we are ourselves persuaded to imply from § 13(c) a federal remedy.

The criteria stated in *Gully* and *Bell* v. *Hood* are satisfied when the complaint is read in the foregoing manner. The claim presents the court with the two issues mentioned in the preceding paragraph, plus (assuming the first two are surmounted) the issue on the merits of whether there actually was a violation of the § 13(c) agreement here.

Our conclusion that federal question jurisdiction is appropriate is reinforced by *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963). In that case an airline board of adjustment was set up by an agreement between Central Airlines and its employees' union pursuant to section 204 of the Railway Labor Act, 45 U. S. C. § 184, which required

that the board be established by a private contract. It was the board's function to resolve disputes growing out of application of the parties' collective bargaining agreement, and under the Act the board's awards were final and binding, 45 U. S. C. § 153 Second. The litigation arose when the union sought enforcement of such an award in federal court upon the airline's refusal to comply therewith. The Supreme Court held that the action to enforce the award arose under federal law, giving rise to federal question jurisdiction. The thrust of the Court's analysis was as follows:

> "The contracts and the adjustment boards for which they provide are creations of federal law and bound to the statute and its policy. If any provision contained in a § 204 contract is enforceable, it is because of congressional sanction: '[T]he federal statute is the source of the power and authority . . . The enactment of the federal statute . . . is the governmental action . . . though it takes a private agreement to invoke the federal sanction . . . A union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it . . .' *Railway Dept.* v. *Hanson*, 351 U. S. 225, 232. That is, the § 204 contract, like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts."

372 U. S. at 692. Because the instant case likewise involves enforcement of a contract formed pursuant to federal law, *Central Airlines* supports our conclusion that federal question jurisdiction exists.[6]

6. While *Central Airlines* provides support for our conclusion that jurisdiction is present here, it is not on all fours with the instant case. The right sought to be enforced in *Central Airlines*—the right to binding arbitration—was expressly created by the statute. The statute required the creation of the board of adjustment, 45 U. S. C. § 184, and specified that it would settle labor disputes through binding arbitration, 45 U. S. C. § 153 Second. The mandated contract served only to implement that right by creating the board. In the instant case, on the contrary, the right to arbitration sought to be enforced was created by the mandated contract only, not by § 13(c).

In addition to the presence of a substantial federal question, a prerequisite for jurisdiction under 28 U. S. C. § 1331 is that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs . . ."[7] The Union's amended complaint made the following allegation regarding the amount in controversy:

> "Plaintiff has been damaged in an amount greater than $10,000.00 by virtue of Defendant's refusal to pay cost-of-living escalator increments as under the expired working agreement, and because of, among other things, Defendant's refusal to arbitrate, the members of the Plaintiff are without a pension plan, do not have unemployment benefits, and are in a state of limbo without assurance of employment, all of which is in excess of the $10,000.00 jurisdictional amount."

The District argues that the Union has not shown by this allegation that the requisite amount is in controversy. We note at the outset that in the similar *Kansas City* and *LaCrosse* cases, the eighth and seventh circuits respectively found the $10,000 jurisdictional amount to be in controversy. *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, No. 78-1255, slip op. at 7 (8th Cir. Aug. 21, 1978); *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981, slip op. at 15-17 (7th Cir. Oct. 19, 1978).

In *Saint Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288-89 (1938), the Supreme Court set out what remain the controlling principles guiding a determination of whether or not an action meets the jurisdictional amount:

> "The rule governing dismissal for want of jurisdiction in cases brought in federal court is that, unless the law gives

7. There is no jurisdictional amount requirement under § 1337, the alternative provision under which jurisdiction is here asserted; however, the statute sought to be enforced must regulate commerce or protect trade and commerce. We do not reach the question of the applicability of § 1337 in view of our conclusion that the jurisdictional amount requirement of § 1331 is satisfied.

> a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." [Citations omitted.]

See Jimenez Puig v. *Avis Rent-A-Car System*, 574 F. 2d 37 (1st Cir. 1978). These principles apply equally to actions for declaratory and injunctive relief. *See Hunt* v. *Washington Apple Advertising Commission*, 432 U. S. 333, 346 (1977). There is no indication that the Union's jurisdictional amount assertion was not made in good faith. Accordingly, to warrant dismissal of the complaint on jurisdictional amount grounds it would have to appear "to a legal certainty" that the amount in controversy actually does not exceed $10,000. Such is not the case here.

The Union is suing in its representative capacity to vindicate the rights of employees to binding interest arbitration under the collective § 13(c) protective arrangements. It has standing to do so. *See Smith* v. *Evening News Association*, 371 U. S. 195, 200 (1962); *cf. Warth* v. *Seldin*, 422 U. S. 490, 511 (1975) (an association may have standing solely as representative of its members). The Union therefore can rely upon the actual or threatened injury to individual employees in establishing the jurisdictional amount. *Hunt* v. *Washington Apple Advertising Commission*, 432 U. S. at 346.

The Supreme Court held in *Hunt* that a representative plaintiff such as the Union can establish the requisite amount in controversy if the claims of at least some of the individuals represented exceed that amount. Thus, the jurisdictional amount in controversy is met in this case unless it is clear "to a legal certainty" that the rights to interest arbitration of not even some of the employees is worth $10,000. It is hard to say this is so. But we do not rest on that premise. We would also venture that the Union is entitled to aggregate the value of its members' claims to satisfy the jurisdictional amount requirement. To be sure, the Supreme Court in *Hunt* reserved the question of whether

a representative plaintiff could aggregate individual claims in establishing the jurisdictional amount. But while the issue is thus as yet undecided, there are convincing reasons to aggregate in these circumstances.

It is the rule that "when several plaintiffs united to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Zahn* v. *International Paper Co.*, 414 U. S. 291, 294 (1973), *quoting Troy Bank* v. *G. A. Whitehead & Co.*, 222 U. S. 39, 40-41 (1911). On the other hand, when two or more plaintiffs having "separate and distinct" claims unite for "convenience and economy" in a single class action, each member of the class must satisfy the jurisdictional amount requirement. *Id.; Snyder* v. *Harris*, 394 U. S. 332 (1969). The distinction between "a common and undivided interest" and "separate and distinct" claims is not entirely clear, C. Wright, Law of Federal Courts § 36, at 139 (3d ed. 1976). It can nonetheless be said that the individual employees in the present case are not united merely for litigation "convenience and economy" as in *Zahn* and *Snyder*. Their claims are united in this single action by the Union in conformance with the fundamental premise of collective bargaining that a union is to represent its members in all aspects of the labor-management relationship. This premise is part of national labor policy. *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U. S. 175, 180 (1967). Also, any right to interest arbitration under the § 13(c) agreement cannot be viewed practically as a right possessed by each employee individually because it can only be exercised collectively. To be sure, each employee benefits from that right; it has economic value to each that should be included in determining the amount in controversy. But its collective nature would seem to make it a "single right," within the meaning of *Troy Bank*.

Moreover, in actions seeking declaratory or injunctive relief the amount in controversy is measured by the value of the object of the litigation. *Hunt* v. *Washington Apple Advertising*

Commission, 432 U. S. at 347; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936); *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U. S. 121, 126 (1915); *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 336 (1907); 1 J. Moore, Federal Practice ¶¶ 0.95, 0.96 (2d ed. 1975); C. Wright, A. Miller & E. Cooper, *supra*, § 3708. The Union's object is binding arbitration of the disputed terms of the parties' collective bargaining agreement.[8] The value of that arbitration would seem to be the difference between the expected value of the terms under the arbitration award and the value of the terms that would exist in the absence of arbitration. The value of the arbitration is impossible to determine precisely, because both the terms of the arbitration award and the terms of employment in the absence of arbitration are speculative. These valuation problems make it virtually impossible to conclude to a legal certainty on the current record that the amount in controversy is less than the required $10,000. This is especially so, because of the reasonableness of the claim that the aggregate interest of the 107 employees exceeds $10,000. The District presently is paying wages (presumably at the rate set by the former collective bargaining agreement), but has not made cost-of-living increases as called for by the former agreement. On this cost-of-living factor alone, the Union claims a $35,000 total loss. Further, it is not clear whether or not the District, in the absence of a new agreement, would abide by other provisions of the former agreement, such as those governing discipline and discharge

8. *Davenport* v. *Procter & Gamble Mfg. Co.*, 241 F. 2d 511 (2d Cir. 1957), involved a diversity action by a union president to compel the employer to arbitrate a dispute over the wage rate, as required by the collective bargaining agreement. The court held that the jurisdictional amount requirement was satisfied, stating:

> "In considering the jurisdictional amount requirement the court should look through to the possible award resulting from the desired arbitration, since the petition to compel arbitration is only the initial step in a litigation which seeks as its goal a judgment affirming the award."

Id. at 514.

procedures, grievances, vacations, medical insurance, or pensions. In light of these considerations, we conclude that the Union's allegation that the amount in controversy exceeds $10,000 satisfies the jurisdictional amount requirement of § 1331, and that subject matter jurisdiction over the Union's action exists pursuant to that provision. In view of this, we need not consider the applicability of § 1337.

III.

While contrary to the district court we conclude that there is subject matter jurisdiction, that ruling does not end matters. Notwithstanding federal jurisdiction over the subject matter of the Union's § 13(c) claim, the summary dismissal by the district court must be affirmed if the Union has failed to state a claim upon which relief can be granted. *See, e.g., Wheeldin* v. *Wheeler*, 373 U. S. 647, 649 (1963); *Bell* v. *Hood*, 327 U. S. 678 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (1st Cir. 1950).[9]

The Union's claim, as stated earlier, is that by violating the § 13(c) agreement, the District violated § 13(c) itself. The theory underlying this claim is that § 13(c) requires compliance with whatever labor protective arrangements are developed under its mandate, approved by the Secretary of Labor, and specified in an UMTA assistance contract. A two-part inquiry is necessary to determine whether this claim is remediable.[10] We first must decide whether a breach of such a protective

9. The issue of implied remedy was raised in the district court by appellee's motion to dismiss for failure to state a claim, and has, in full substance, been argued and briefed by both sides, albeit in the context of determining whether the Union's claim was insubstantial, frivolous or made solely to obtain jurisdiction. The issue is closely interwoven with the question of subject matter jurisdiction. This is not, therefore, a situation where a remand is required so that the district court may consider the question first. *See Singleton* v. *Wulff*, 428 U. S. 106, 120-21 (1976); *cf. Molina-Crespo* v. *Califano*, No. 78-1123 (1st Cir. Sept. 22, 1978).

10. *See* discussion *supra* at 17.

arrangement constitutes, implicitly if not expressly, a violation of § 13(c). If so, we must then determine whether the Union has a private federal remedy for a statutory violation of that nature.

A.

Section 13(c) of the UMTA does not explicitly require compliance with the labor protective arrangements that it dictates must be made as a condition of financial assistance under the Act. We feel, however, that § 13(c) clearly implies a requirement that the protections upon which assistance is conditioned be honored.

The § 13(c) statutory scheme is more extensive than at first meets the eye. Section 13(c) commands, as a condition of receipt of federal financial assistance, that labor protective arrangements be made that are deemed fair and equitable by the Secretary of Labor. These arrangements are not only to be fair and equitable in some general sense, but "shall include" provisions necessary to carry out major substantive guarantees to transit workers that Congress lists in the statute, *e.g.*, preservation of rights under existing collective bargaining agreements, protection of individual employees against a worsening of their employment positions, and priority in reemployment. *See* notes 1, 5, *supra*. Moreover, § 13(c) directs that the terms and conditions of the approved labor protective arrangements be specified in the federal grant contract itself. The statute thus does more than prescribe the making of any kind of fair labor arrangements between a federal grantee and its employees. It confers far-reaching protections upon employees of grant recipients. It assures, in addition, that arrangements guaranteeing these protections will be made, approved by the highest federal labor official and embodied in the federal grant contract itself.

This statutory scheme leaves room for no conclusion but that Congress intended that grant recipients must comply with the arrangements. The statute would be utterly meaningless if the

arrangements were not observed. The object of the statute is to afford certain protections to transit workers; if it required only that the arrangements be made but not that they be respected, it would fail in this purpose, since no other machinery is provided for translating the protections into reality. Our conclusion accordingly is that § 13(c), implicitly though not expressly, commands compliance with the labor protective arrangements by the grant recipient. *Accord, Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, No. 77-1981, slip op. at 10 (7th Cir. Oct. 19, 1978). Noncompliance effectvely violates § 13(c).

Section 13(c)'s implied requirement of compliance it not limited, moreover, to just those arrangements that may be said to be comman led by the substantive provisions articulated in § 13(c). Thus here the absence of an express requirement for interest arbitration is not significant. The statutory emphasis is upon the securing of fair and equitable arrangements to protect the interests of employees, as determined by the Secretary of Labor, which arrangements shall include "without being limited to," certain specified provisions. Once the labor protective arrangements have been made, approved, and incorporated in the grant contract they have become the vehicles for carrying out Congress' purpose. We believe that Congress contemplated that a grant recipient would comply with all the terms and conditions of an approved protective arrangement upon which the grant was conditioned, regardless of whether or not other terms and arrangements would have been equally acceptable under § 13(c).

B.

Having concluded that § 13(c) contemplates that a grant receipient live up to the labor protective arrangements upon which its grant is conditioned, and that noncompliance therefore violates § 13(c), the next aspect of the inquiry is whether there is a private federal remedy available to the Union for

breach of such an arrangement. The UMTA does not explicitly provide such a remedy. As a result, the Union can prevail only if such a remedy is implicit in the Act.

The Union argues that we do not need to imply a private cause of action, because "the statutory command to make a contract expressly creates a private action—to enforce the contract—and enforcement of the contract directly, indirectly and automatically enforces the statute." Similarly, the court in *LaCrosse* stated:

> " 'Congress intended that the contracts embodying the 'fair and equitable arrangements' were to be enforceable contracts. It would be fatuous to suggest otherwise. Because the contracts were to be enforceable, it follows that they were to be enforced at the instance of the parties to the contracts.' "

No. 77-1981, slip op. at 17. This analysis is perhaps too simple Section 13(c) nowhere commands the making of a contract between a union and a grant recipient setting forth the terms of the labor protective arrangements. To be sure Congress contemplated that "specific conditions for worker protection will normally be the product of local bargaining and negotiation." H. R. Rep. No. 204, 88th Cong., 2d Sess., *reprinted in* [1964] U. S. Code Cong. & Ad. News 2569, 2584-85. But, Congress did not require that the labor protective arrangements be included in any contract other than the grant contract, to which the union is not a party. We feel that an implied congressional intention that contracts between unions and employers, which Congress neither required nor contemplated would be made in all cases, be federally enforceable is not a wholly adequate basis upon which to premise a union's right to enforce § 13(c) labor protective arrangements in federal court. We reach a similar result by a slightly different route. We think it proper to infer that § 13(c) implies a private federal cause of action for breach of the terms and conditions of the labor protective arrangements whether or not embodied in an actual contract between the employer and its employees.

We begin by recognizing that this case is somewhat different from those decided by the Supreme Court dealing with the implication of a remedy. In *Cort* v. *Ash*, 422 U. S. 66 (1975), and other cases of this genre, there typically has been a federal statute, criminal or civil, whose express substantive commands are alleged to have been violated; the plaintiff has professed to be of the class for whose benefit the statute was enacted; and the question has been whether be may bring a private action for the statutory breach in the absence of explicit authority being given to this class to bring private actions. Often in the picture, also, have been alternative express remedies, such as provision for agency enforcement without any provision for a private suit. *See, e.g., National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453, 471 (1974); *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964). Here, however, only an implied statutory command—that the labor protective arrangements be complied with—is allegedly violated. The substantive right to interest arbitration asserted stems from the contract only, not the statute. In addition, there is no explicit private remedy.

But while this case does not neatly fit within the *Cort* paradigm, we believe that implication of a federal remedy is appropriate—for reasons that, in the end, are entirely consistent with the logic of *Cort* v. *Ash*. Section 13(c), as we have seen, in an extensive and federally-oriented statutory scheme. It commands, as a condition of UMTA assistance, the making of labor protective arangements whose content must meet minimal specified substantive requirements and have the approval of the Secretary of Labor. Section 13(c) commands in addition that the terms and conditions of the arrangements be specified in the federal grant contract. The protective arrangements thus give rise to federally-created rights, and we are mindful that "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 457 (1957). To leave to the courts of fifty states

the enforcement of labor protective arrangements that were formed, approved by the Secretary of Labor, and specified in federal grant contracts in order to carry out federally-created rights would seem anomalous indeed. But what tips the scale further, and decisively we think, in favor of a federal remedy is that the federal financial assistance contract between the Secretary of Transportation and the grantee is enforceable in federal court in suits brought by the Secretary. 49 U. S. C. § 1608(a); 12 U. S. C. § 1749a(c)(3) & (4); 28 U. S. C. § 1345. Section 13(c)'s requirement that the terms and conditions of the labor arrangements be part of the grant contract therefore makes them enforceable in federal court in suits by the Secretary of Transportation. Congress clearly contemplated that the labor protective arrangements would be subject to federal court enforcement proceedings, at least in suits brought by the Secretary of Transportation. Moreover, such suits in federal court to enforce the terms of a grant contract would be governed by federal substantive contract law, not varying state law dependent upon venue. *Priebe & Sons* v. *United States*, 332 U. S. 407, 411 (1947); *United States* v. *Standard Rice Co.*, 323 U. S. 106, 111 (1944); *cf. Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). By contrast, there is no countervailing indication that Congress meant to leave these matters to localized state court decision. A preference for federal jurisdiction is understandable given the inevitable interrelation between the negotiated labor protective arrangements and the federal statute dictating them; enforcement litigation will surely involve interpreting the protective arrangements in light of the purposes and policies of § 13(c), as well as resolving issues relating to the interplay between federal and state labor policies and possible supremacy clause problems.

As well as contemplating enforcement of the labor protective arrangements in federal court at the suit of the Secretary of Transportation, Congress also must have contemplated that protected transportation employees would be able to institute private enforcement actions. Employees covered by a § 13(c) agreement, or their union, could of course bring a contract action, in state if not federal court, to enforce the agreement. In addition, protected employees, whether covered by a § 13(c) agreement or not could likely enforce the protections as donee or intended beneficiaries of the assistance contract between the Secretary of Transportation and their employer. *See Euresti* v. *Stenner*, 458 F. 2d 1115, 1118-19 (10th Cir. 1972); *United States ex rel. Johnson* v. *Morley Construction Co.*, 98 F. 2d 781, 788-89 (2d Cir. 1938); Restatement of Contracts §§ 133, 135 (1932).[11] Lastly, it seems plausible, although we do not undertake to decide the question, that protected employees could successfully maintain a suit under the Administrative Procedure Act, 5 U. S. C. §§ 701-06, to compel the Secretary of Transportation to institute action in federal court to enforce the labor protective obligations of a recipient of UMTA funding. *See generally Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971).

We do not rest on these consideration alone in implying a private federal remedy on the Union's behalf. The Supreme Court in *Cort* v. *Ash*, 422 U. S. at 78, identified four factors it regarded as key to the implication of a private remedy from a federal statute. These factors were described as follows:

> "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy

11. *See also McDaniel* v. *University of Chicago*, 548 F. 2d 689, 694 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 765 (1978); *City of Inglewood* v. *City of Los Angeles*, 451 F. 2d 948, 954-56 (9th Cir. 1972); *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (5th Cir.), *cert. denied*, 388 U. S. 911 (1967).

Unless the presence of diversity jurisdiction made it clearly cognizable by a federal court, such a third-part action might be limited to a state court, although federal question jurisdiction would possibly be open. *See generally Miree* v. *DeKalb County*, 433 U. S. 25 (1977).

or to deny one? See, *e.g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394-395 (1971); *id.*, at 400 (Harlan, J., concurring in judgment)."

The first *Cort* factor is plainly met here. Transit workers affected by UMTA assistance are the especial beneficiaries of § 13(c), and Congress created a federal right in their favor by directing that the labor protective arrangements be made, implying that they be abided by, and requiring that their terms and conditions be specified in the federal grant contract.

The second *Cort* factor—indication of a legislative intent, explicit or implicit, to create a private federal remedy—is also met. To a major extent, § 13(c) relies upon privately-negotiated arrangements which, by their nature, invite private enforcement. And we think that Congress signalled an intention to authorize federal rather than merely state court enforcement when it directed that the labor protective arrangements be incorporated in the federal grant contracts. It would be anomalous if arrangements forming a part of the terms of that federally enforceable contract were enforceable by the protected employees only in state tribunals. In addition, since the Secretary of Transportation is not an official usually charged with protecting the rights of labor, we think Congress would reasonably have assumed that the persons for whose benefit the protective provisions were inserted—the transit workers and their unions—would themselves be permitted to enforce these rights in the forum in which

litigation concerning the terms of the federal grant would normally occur. The statute delegates no such enforcement authority to the Secretary of Labor—the logical federal official to enforce such rights if they were to be enforceable only by a public officer. And we are aware of no affirmative reason why Congress would think it disadvantageous for the intended beneficiaries of this legislaton to act in their own behalf, especially where the labor arrangements would likely be in the form of a contract to which they were a party. *Cf. National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U. S. 453.

Application of the third *Cort* factor turns on whether the "legislative scheme" against which to test the implied remedy is the entire UMTA or just § 13(c). If the former, the third factor is probably beyond us: a court cannot accurately say whether an implied remedy for labor will in these circumstances further or hinder the goals of mass transportation. If the legislative scheme is defined as § 13(c) alone, however, it would seem obvious, for reasons to which we have already partially alluded, that there are distinct benefits to the employees in having a private remedy in the federal courts. The Secretary of Transportation is unlikely to move as swiftly as the employees to sue for breach of the protective arrangements, and the state courts, or some of them, may be less concerned to interpret the arrangements in light of Congress' purposes in enacting § 13(c). The § 13(c) protective arrangements are not merely the product of private contracts, freely negotiated, but are vehicles for carrying forward the substantive labor policies set forth in the federal statute. If the arrangements are to serve their labor protective function,

> "their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if [an arrangement] contrary to the federal command were nevertheless enforced under state law or if [an arrangement] were struck down even though in furtherance of the federal scheme."

International Association of Machinists v. *Central Airlines, Inc.*, 372 U. S. at 691. Therefore, effective federal enforcement of the terms of the labor protective arrangements, in the form of private actions by protected transportation workers, would serve the purposes underlying § 13(c).

Finally, we think the fourth *Cort* factor points in favor of an implied federal remedy. The Union's precise cause of action, an action to enforce the labor protective arrangements created pursuant to § 13(c), could not exist without the UMTA. It was pursuant to the UMTA that the Union and the District entered into the § 13(c) agreements and the agreements' protective arrangements were incorporated into the assistance contracts between the District and the federal government. It therefore seems manifest that enforcement of the protective arrangements is not a function traditionally relegated to state law nor basically a concern of the states. Congress was concerned with enforcement, and contemplated at least some enforcement in federal courts.

It is true that if the Union's action were viewed narrowly as just an action to enforce the § 13(c) agreement, an argument could be made that it is one traditionally relegated to state law. The basis for the argument would be that collective bargaining agreements between a state agency and the representative of its employees traditionally are governed by state law and einforced in state courts. *See* 29 U. S. C. § 152(2), 185, 187. While § 13(c) agreements are not usual collective bargaining agreements specifying terms and conditions of employment, they are somewhat analogous. Section 13(c) agreements, however, differ from usual collective agreements entered into by state and local agencies in that their terms are regulated by federal law. The UMTA requires that § 13(c) agreements be made, and places important requirements on their content. Usual collective bargaining agreements covering state employees are subject only to state regulation. *See* 29 U. S. C. § 152(2); *cf. National League of Cities* v. *Usery*, 426 U. S. 833 (1976) (wages and

hours of state employees constitutionally excluded from federal regulation). Therefore, the traditional allocation to state courts of enforcement of state collective agreements is not a basis for holding that enforcement of arrangements pursuant to § 13(c) should also be left to state tribunals. Federal regulation makes enforcement of the labor protective arrangements the concern of the federal government, not "basically the concern of the States," rendering an implied federal remedy not inappropriate under *Cort's* fourth factor.

We therefore conclude that the Union does have a federal cause of action, implied from UMTA § 13(c), to enforce the labor protective arrangements to which the District agreed as a condition of federal financial assistance under the Act.[12] The Union's complaint thus states a claim upon which relief can be granted and over which the district court has subject matter jurisdiction. Of course, nothing herein is meant to indicate our views on the merits of the action.

Reversed and remanded for proceedings not inconsistent herewith.

12. Our conclusion that § 13(c) implicitly provides the Union with a cause of action reinforces our determination that the Union's claim arises under federal law for jurisdictional purposes. *Ivy Broadcasting Co.* v. *A. T. & T.*, 391 F. 2d 486, 489 (2d Cir. 1968); *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F. 2d 424, 426 (2d Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966); *T. B. Harms Co.* v. *Eliscu*, 339 F. 2d 823, 826-28 (2d Cir. 1964); *cert. denied*, 381 U. S. 915 (1965); C. Wright, A. Miller, & E. Cooper, *supra*, § 3562 at 402-03.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

v.

DIVISION 1287, AMALGAMATED TRANSIT UNION,
AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

and

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

v.

DIVISION 1287, AMALGAMATED TRANSIT UNION,
AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

The American Public Transit Association (APTA), pursuant to Supreme Court Rule 42, hereby moves for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari and for reversal of the decision of the United States Court of Appeals for the Eighth Circuit. The motion is necessitated by Respondent's refusal to consent to the filing of the appended brief.[1]

[1] Petitioner has consented pursuant to Supreme Court Rule 42.

APTA is the major national representative of the urban mass transit industry. APTA's members include transit system operators both large and small and public and private, as well as rail, bus and other vehicle operators, manufacturers and suppliers to the industry, state Departments of Transportation and various subdivisions of local public bodies. APTA's more than 250 mass transit system members provide 90% of all mass transit rides in this country.

APTA regularly represents its members' interest in matters before the courts, the United States Congress, the Executive Branch and the federal regulatory agencies. Such representation constitutes a significant aspect of APTA's activities and includes participation as *amicus curiae* in other matters before this Court.[2]

The issues presented in this case concern the interpretation, validity and method of enforcement of very similar labor protection agreement to which almost all APTA members are a party. Such agreements have a direct and immediate impact upon APTA members in that labor costs comprise 75% of a transit system's operating expenses. The decision below suggests the possibility of future federal court review of *any* management decision. As such, it implies major changes in transit labor relations as it expands the scope of the Urban Mass Transportation Act far beyond the intent of the sponsors—who rejected proposed amendments that would have broadened the Act's labor relations impact. This matter is of additional importance to APTA and its members as it is the first time this Court has been asked to construe the Urban Mass Transportation Act of 1964.

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[2] *E.g., New York City Transit Authority* v. *Carl Beazer*, No. 77-1427 (1978).

It is the position of APTA that the Court below, by virtue of its finding that federal subject matter jurisdiction lies for the purpose of interpreting and enforcing labor protection agreements, has created a new federal transit labor law and has gone beyond the statutory mandate by preempting state and local law governing the labor relations between public bodies and public employees, and changed the nature of transit industry labor relations. Moreover, in equating arbitration of new contract terms with grievance arbitration, the opinions below announce a new federal judicial policy favoring *both* forms of arbitration and the substitution of arbitration for collective bargaining as the preferred method of reaching labor agreements. In addition, it is the position of APTA that the Court below erred in rejecting argument that the contract sued upon was an improper delegation of the Transit Authority's state-authorized powers. This far reaching holding is in conflict with APTA members' differing (state transit agency) enabling legislation which often limits the agencies' powers. Thus, the perspective of the Association on these particular issues goes beyond that of the Petitioner.

For these reasons and those stated in the annexed brief, it is respectfully requested that the motion of APTA for leave to file this brief as *amicus curiae* in support of Petitioners be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

INTRODUCTORY STATEMENT

The Kansas City Area Transportation Authority ("KCATA") has filed with this Court a petition for a writ of certiorari to consider the validity, interpretation and method of enforcement of a specialized labor agreement between the Authority and the local of the Respondent labor union. This action is one of a series of six such cases brought by Respondent International Union. Two have resulted in decisions by the courts below that suggest that the congressional intent in enacting the Urban Mass Transportation Act was to override state law. This holding is in conflict with the legislative history of the Act, the language of the Act,

and the traditional tenet that it is for each state to determine its own public policy as respects labor management relations for local public employees, and is inconsistent with state procedures for labor relations dispute resolution—state procedures specifically recognized by the Congress when it considered the Transit Act.

The Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 et seq. (the "Act") authorizes the Secretary of Transportation to provide grants and loans to state and local public bodies for purposes relating to the improvement of mass transportation. Such assistance is contingent upon the applicant public agency satisfying various requirements including the making of arrangements to protect the interests of employees who are affected by such assistance. The Urban Mass Transportation Administration evaluates applications for assistance and when it decides an application is worthy, it forwards a copy to the Department of Labor to certify that satisfactory employee protective arrangements have been made and that Section 13(c) of the Act has been satisfied. The Department refers copies of the grant application to labor organizations representing transit workers within the service area of the applicant transit property.[1]

APTA believes the Department of Labor will grant the required certification only if the parties (the applicant transit system and the union(s) involved) can agree as to terms of protections. APTA members believe that their grant assistance will either be delayed or will never be awarded if the union fails to agree and thus many have consented to what they view as inappropriate union demands.[2]

[1] J. Stern *et al.*, *Labor Relations in Urban Transit* 72, U.S. Dep't. of Transp. Report No. WI-11-0004 (1978), citing speech by L. Yud, Chief, Division of Employee Protections, U.S. Dep't. of Labor, "Employee Protection Requirements in the Urban Mass Transportation Act", *reprinted in Developing Mass Transit Systems*, Proceedings of a Conference cosponsored by the New York Law Journal and the Urban Mass Transportation Administration, 207 (S.A. Payton ed. 1974).

This Act is silent as to how these arrangements are to be enforced. It does not specify any remedy and particularly does not provide a private remedy. Traditional remedies, such as enforcement of the labor arrangements in the courts of the states are not foreclosed and jurisdiction to hear such cases remains in those courts.

The Congressional findings and consequent purposes of the transit assistance program are clearly set forth in the Act, as are a limited number of "labor standards." These standards do not include establishment of a federal transit labor law.

The decision of the Court of Appeals below notes that "the District Courts are divided on the question" of whether the case is one that "arises under" the laws of the United States[3] and admits that "the question is not free from doubt."[4] The Court of Appeals then holds "that a controversy between a public transit agency and a labor union involving a claim of breach

[2] One analyst summarized management's argument in the following way: "[they] . . . charge that the international unions or their locals have limitless power to influence the terms of protection or that they have veto power over grant applications . . ." The analyst proceeds to say that the unions dispute this view. Stern *et al.*, supra at 99.

[3] *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transp. Auth.*, No. 78-1255 at 7 (8th Cir., August 21, 1978).

[4] *Id.* at 11.

of a 13(c) agreement is a controversy that arises under the laws of the United States." [5] By virtue of this holding and contrary to the history of the Act,[6] the Court of Appeals has taken a significant step towards establishing a national transit labor law preempting the laws of the several states governing the labor rights of public employees. And, it may have established new labor law applicable to a myriad of other local public bodies.

In ordering arbitration, pursuant to the labor protective agreement, the Court of Appeals has established new federal law in a second area. It has altered the balance of relations between the state and federal governments by ruling that the KCATA, by reason of its acceptance of federal funds, may not later deny its authority to delegate to a private arbitrator the authority to set wages and benefit terms for public employees.

A further major element in the opinion below is the equating of federal policy favoring grievance arbitration with a purported policy favoring interest arbitration. Such a ruling has wide impact in the context of labor relations and labor law and, although not an issue of concern in the context of this brief *amicus curiae*, it is a matter which suggests a need for review.

The specific issues before this Court, therefore, are whether Section 13(c) of the Urban Mass Transportation Act creates a new federal transit labor law, whether Section 13(c) provides a private remedy, whether the underlying claim for enforcement of an agreement executed in order to comply with Section 13(c) gives rise to a cause of action in the federal courts, and whether acceptance of federal funds prevents a transit entity from denying its authority to delegate (in perpetuity) control of the public purse to a private arbitrator—without standards of control or public accountability.

[5] *Id.* at 11.

[6] Floor manager of the Act, Senator Williams of New Jersey, stated ". . . if the bill shall be enacted, we must have a record that will show that the bill does not preempt state law; it does not control or dominate with irrevocable authority local situations. The bill provides for the encouragement of collective bargaining." 109 *Cong. Rec.* 5417 (1963).

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* of the American Public Transit Association ("APTA")[7] is submitted with a motion for leave to file, timely presented, in accordance with Rule 42 of the Rules of the Supreme Court.

The issues before the Court in this case affect not only the Kansas City Area Transportation Authority ("KCATA"), but the mass transit industry as a whole. The scope of the issues and the impact of the decision on labor relations in mass transit will be immense.

Each year, the more than 250 transit system members of APTA apply for hundreds of Urban Mass Transportation Administration grants and must, as a precondition for receipt of those grants, make arrangements for the preservation of the interest of employees. Such arrangements have, in the 14 years since the UMTA program was initiated, usually included a "13 (c) Agreement," such as that on which Respondent herein relies.

[7] The American Public Transit Association is a not for profit corporation dedicated to representation of the interests and concerns of public transit. Its membership includes more than 250 public and private bus and rail mass transit systems throughout the country. APTA members provide more than 90% of all mass transit rides in the country each year.

The Court of Appeals' ruling, requiring the KCATA to submit to interest arbitration pursuant to the 13(c) agreement jeopardizes the labor relations of each of these transit systems.

The Court of Appeals' ruling also takes from APTA members the ability to establish wages and benefits pursuant to the traditional process of labor-management negotiation. And, because labor costs comprise 75% of their operating budgets,[8] the decision deprives APTA members of the ability to control the management of their resources.

Of APTA's 250 transit system members, more than 200 are "public bodies" and are organized under specific provisions of state law which delineate their authority. They are generally governed by boards of directors, commissioners or the like who are either elected or appointed to guide the transit system. In most cases, the authority of these governing officers is also established by the relevant enabling legislation.[9] Many APTA members share the concern of the KCATA Commissioners that the arbitration ordered by the court enforces a provision of an agreement which was beyond their authority under state law and illegal from its inception.

[8] An estimated 75.6% for 1977 (a figure arrived at by computing the ratio of total industry labor costs ($3,255,720,000 in 1977) to total operating expense ($4,304,800,000 that year)). American Public Transit Assn., Transit Fact Book 21, 35 (1977-78 ed.).

[9] *See, e.g.*, Kan. Stat. Ann. § 12-2534, and Mo. Rev. Stat. § 238.100 and N.Y. Pub. Auth. Law §§ 1331-1353 (McKinney) for the relevant enabling legislation of two APTA members involved in such litigation (KCATA and the Central New York Regional Transportation Authority of Syracuse, New York).

In addition, the excessive interpretation of the statute by the court below would remove jurisdiction from local courts and thrust on already overburdened federal courts an additional major body of potential disputes. Every federal transit grant must be preceded by a 13(c) certification, usually based on a 13(c) agreement. The Department of Labor estimates that it has already made some 3258 13(c) certifications and is presently making some 960 additional 13(c) certifications each year. Thus, the extension of federal jurisdiction will also have great potential impact on our federal court system. Moreover, should the precedent below be affirmed, it may further impact federal courts if other local public bodies are covered by the new jurisdictional reach.

SUMMARY OF PROCEEDINGS

On November 28, 1977, Respondent union filed an action in United States District Court for the Western District of Missouri seeking an injunction ordering arbitration. Judge John W. Oliver, in an unreported opinion, *Division 1287, ATU* v. *Kansas City Area Transportation Authority*, No. 77-0840-CV-W-1 (W.D. Mo. 1978), held that the Transit Authority was obligated to submit to arbitration the making of a new collective bargaining agreement, establishing wages and employment terms.

In reaching this holding, Judge Oliver rejected the Transit Authority's motion to dismiss for lack of subject matter jurisdiction and declined to hold that the matter did not "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331(a).

Disagreement between the parties as to the relevant facts was limited to differing views as to the negotiat-

ing history and meaning of collective bargaining and "13(c)" agreements.

In reviewing the legislative history of the bi-state compact which established the Transit Authority, Judge Oliver found that the union had proposed that the legislation include a provision authorizing KCATA to offer new contract arbitration in case of impasse in bargaining (Findings of Fact, #18), but such a provision was not included in the statute as enacted. The union was, however, successful in negotiating a 13(c) agreement which Judge Oliver construed as mandating interest arbitration [10] (Findings of Fact, #22-24).

Judge Oliver found that there was no legal certainty that the amount in dispute was not more than $10,000 (Findings of Fact, #61). He also rejected, because of past practice, the Authority's view that "the construction of the 13(c) agreements sought by the union would be beyond the powers granted the Commissioners of KCATA . . . and would be illegal" No. 77-0840-CV-W-1 at 20.

Judge Oliver also offered his summarized version of "controlling federal labor policy" as applicable to § 13(c) agreements *Id.* at 23. In the view of *amicus,* this language is unfortunately excessive in suggesting

[10] Interest arbitration has been defined by the 8th Circuit (No. 78-1255 note 1 at 2) in the instant matter:

> Interest arbitration, which is sometimes called contract arbitration or quasi-legislative arbitration, is the arbitration that may be required when an employer and the collective bargaining agent of employees come to an impasse with respect to the terms and conditions of a new collective bargaining agreement. It differs from grievance arbitration which may be required when disputes arise under an existing collective bargaining agreement.

that there is a Congressionally mandated national federal labor policy for transit.

In affirming the District Court, and by stating that "a breach of a 13(c) agreement is a controversy that arises under the laws of the United States" (No. 78-1255 at 11), the Court of Appeals both found that the federal courts had subject matter jurisdiction and indicated an underlying belief that the Urban Mass Transportation Act established a new federal transit labor law. The Court of Appeals also offered the view that "the obligation to arbitrate is binding on the agency, regardless of state law or policy" No. 78-1255 at 17.

SUMMARY OF RELATED PROCEEDINGS

Absence of Subject Matter Jurisdiction

The instant case is perhaps the culmination of a great deal of "related" litigation. In 1973, the Metropolitan Atlanta Rapid Transit Authority sought enforcement of a "no-strike" clause in the Superior Court of Fulton County, Georgia against a local of this same international union. This union then petitioned for removal alleging federal jurisdiction under 49 U.S.C. § 1601 *et seq.,* and 29 U.S.C. § 185. In regard to the jurisdictional claim under 49 U.S.C. § 1609(c), the same provision herein relied on, United States District Judge Albert J. Henderson, Jr. remanded to state court saying:

> At issue is the union's alleged failure to honor this (arbitration) portion of the agreement. No argument exists with respect to the remaining provisions of the contract, nor is an interpretation of UMTA or any other federal statute involved. This is simply a suit to enforce the terms of a contract.

> There is no diversity of citizenship alleged here and the case does not involve a right or immunity guaranteed by the Constitution or laws of the United States so as to create federal question jurisdiction. *Metropolitan Atlanta Rapid Transit Authority* v. *Division 732, Amalgamated Transit Union,* No. 14892 (N.D. Ga., July 1, 1973).

In *Transit Authority of Louisville & Jefferson County* v. *Amalgamated Transit Union,* No. 76-0535-L(B) (W.D. Ky., July 20, 1977), the Transit Authority similarly filed suit in state court to enforce a provision of a labor agreement (a memorandum committing the parties to the use of good faith in attempting to qualify its employees for the county Employee Retirement System). The union removed to United States District Court pursuant to 28 U.S.C. § 1441(b) and § 1331(a) asserting that the Authority violated the memorandum and demanding arbitration. The Authority sought remand to the state court under 28 U.S.C. § 1441(b) and Judge Rhoades Bratcher, citing *Gully* v. *First National Bank in Meridian,* 299 U.S. 109 (1936), ruled for the Authority stating:

> The heart of this action lies in the body of contract law generated in the Commonwealth of Kentucky. TARC's complaint might implicitly involve elements of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.,* but these are not sufficient bases for jurisdiction in the forum. The federal law alleged to be involved must be an essential element of plaintiff's case if defendant is to prevail.

These unreported decisions were followed by six instances where Respondent herein, the Amalgamated Transit Union, through its affiliated locals, brought similar actions. The first such case to be decided was brought in United States District Court for the North-

ern District of New York. *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* No. 77-CV-45 (N.D. N.Y., February 7, 1977). There, the union sought declaratory and injunctive relief to compel the Transit Authority to arbitrate the terms of a new collective bargaining agreement alleging that the action arose under 49 U.S.C. § 1601 (and other federal statutes). Jurisdiction under 28 U.S.C. § 1331 (and other statutes) was asserted. Senior District Judge Edmond Port dismissed for want of federal subject matter jurisdiction. *Id.* at 21-22. Judge Port stated:

> I think that this case does not require construction of the statute. If anything, it requires a construction of the contract that was entered into between the parties and should be relegated to whatever disposition would be made of this dispute under state law. *Id.* at 21.

During the appeal process, the parties executed a collective bargaining agreement and the action was dismissed as moot. *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* 578 F.2d 29 (2d Cir., June 7, 1978).[11] The brief opinion notes that the case "raises the question of what is the proper forum for determining when

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[11] During the appeal process, the Taylor law proceedings (N.Y. Civ. Serv. Law § 209 (McKinney 1976) continued and resulted in a fact finding award acceptable to both parties and the parties executed a new collective bargaining agreement. Therefore, the appeal was dismissed as moot. *Division 580, Amalgamated Transit Union* v. *Central N.Y. Regional Transp. Auth.,* No. 77-7116 (2d Cir. 1977); *Division 580, Amalgamated Transit Union* v. *Central NY Reg. Transp. Auth.,* No. 77-CV-45 (N.D. N.Y. 1977).

The fact that the state impasse resolution procedures resulted in agreement is indicative of the Congressional wisdom in not subjecting local public bodies to a federal dispute resolution procedure.

§ 13(c) of the Urban Mass Transportation Act of 1964, ["UMTA"] 49 U.S.C. § 1609(c), requires that affected employers and unions agree to compulsory interest arbitration of the terms of a new collective bargaining agreement" (578 F.2d at 30), and notes that the issue is a "thorny one" (*Id.* at 34). But as it was not necessary to the disposition of that cause, the Second Circuit concluded that the case was moot, and therefore neither analyzed nor decided the question.

Another similar 13(c) case was brought by Local Division 1285 of this same union in United States District Court for the Western District of Tennessee, Eastern Division. There, Judge Harry W. Wellford ruled against the union in resounding fashion:

> In summary, plaintiff seeks to enforce, or an interpretation of, asserted contractual rights in this cause; the suit is not basically concerned with validity or construction of a federal statute or the action taken by an administrative officer or agency under provisions of the federal statute.
>
> > 'The fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant all aspects of its performance or non-performance to be governed by federal law rather than by the state law applicable to similar contracts in businesses not under federal regulations.'

Local Division 1285, Amalgamated Transit Union v. *Jackson Transit Authority,* 447 F.Supp. 88, 94 (W.D. Tenn. 1977), citing

> *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.,* 391 F.2d 486, 490 (2d Cir. 1968). *See also McFaddin Express* v. *Adley Corp.,* 346 F.2d 424 (2d Cir. 1965).

The *Jackson* case is presently on appeal. *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* No. 78-1185 (6th Cir., March 17, 1978).

In Portland, Maine, the local of this same union brought a similar action to compel the transit authority to arbitrate the terms of a new collective bargaining agreement asserting that the action arose under 49 U.S.C. § 1601 (and other federal statutes) and that jurisdiction was proper under 28 U.S.C. § 1331(a).

In *Portland,* Judge Edward T. Gignoux, citing Mr. Justice Cardozo's opinion in *Gully* v. *First National Bank in Meridian,* 299 U.S. 109 (1936) reaffirmed by this Court in *Phillips Petroleum Co.* v. *Texaco, Inc.,* 415 U.S. 125 (1974) as well as by Mishkin, *The Federal Question in the District Courts,* 53 Col. L.Rev. 157, 165 (1953), as instructive with regard to the "arising under" phrase in 28 U.S.C. § 1331, held that there was no subject matter jurisdiction. *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District,* No. 77-54-SD (S.D. Me., January 11, 1978):[12]

> To be sure, § 13(c) undoubtedly was the principal factor leading the parties to enter into the agreement allegedly calling for interest arbitration, but the plaintiff's right to interest arbitration was created by the contract and not by the statute. Section 13(c) does not require arbitration clauses in labor agreements. Indeed, § 13(c) makes no reference to arbitration. The right to arbitrate is a matter of contract and not statutory interpretation, and whatever gloss the Court might place on § 13

[12] The Portland case is presently on appeal, *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District,* No. 78-1077 (1st Cir. February 6, 1978).

> (c) would not alter the relationship of the parties as established in the 1975 § 13(c) Agreement. In short, the contract is the basis of the present action; § 13(c) of UMTA is not. *Id.* at 6-7.

Judge Gignoux noted the unreported cases and the *Division 580* case cited note 11 *supra,* and opined:

> The thrust of the emerging body of case law is in accord with the analysis which this court has just stated—that is, that such controversies do not meet the 'arising under' requirement of 28 U.S.C. § 1331 and § 1337. *Id.* at 7.

In rendering his opinion and in analyzing the "thrust of the emerging body of case law," Judge Gignoux had the benefit of Judge Doyle's (preliminary) contrary view in *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 77-C-202 (W.D. Wis., August 31, 1977). Yet he still felt that "the import of these cases . . . is clear and unambiguous. [Thus] where, as in the present case, the focal point of the litigation is the 13(c) agreement, the action is based in the contract and does not arise under federal law for the purposes of 28 U.S.C. § 1331 and § 1337." *Id.* at 11.

Indeed, in *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 445 F. Supp. 798 (W.D. Wis. 1978), Judge Doyle proceeded to enter judgment sustaining federal jurisdiction. In a lengthy opinion, Judge Doyle correctly asserted that "the core of [the] complaint is [the alleged] right to compel arbitration of the disputed terms of a new collective bargaining agreement." *Id.* at 810. These principles would seem to follow the path laid down in prior litigation and lead to a finding of lack of subject matter jurisdiction.

> A case 'arises under' the Constitution or the laws of the United States when its decision depends upon the interpretation of the Constitution or federal law, (*Cohens* v. *Virginia,* 19 U.S. (6 Wheat) 264, 276 (1821)), that is, when the action may be defeated by one construction of the law and sustained by the opposite construction. *Id.* at 804.

However, through the reasoning enunciated in the labyrinth at 804-09, an opposite conclusion was reached.

In an opinion rendered on October 19, 1978, the Seventh Circuit affirmed. *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* No. 77-1981 (7th Cir., October 19, 1978).

Circuit Judge Swygert did support the test used by Judge Doyle for determining federal subject matter jurisdiction (7th Circuit Opinion in *LaCrosse, Id.* at 8). However, that test is not correctly applied. Although ". . . the terms written into a 13(c) agreement are grounded in federal law" (*Id.*), that analysis fails to take the next step. As Judge Gignoux outlines, "to be sure, § 13(c) undoubtedly was the principal factor leading the parties to enter into the agreement allegedly calling for interest arbitration, but the plaintiff's right to interest arbitration was created by the contract and not the statute. Section 13(c) does not require arbitration clauses in labor agreements." (*Portland,* No. 77-54-SD at 6).

Indeed, the statute would not bar a 13(c) agreement that was silent on or even forbade interest arbitration.

Judge Swygert also followed Judge Doyle's footsteps and supported the jurisdictional finding by reference to *International Association of Machinists* v. *Central Air-Airlines,* 372 U.S. 682 (1963). In that case, the parties

entered into an agreement under the Railway Labor Act (45 U.S.C. § 184), a federal statute which expressly establishes boards of adjustment for the purpose of deciding labor disputes. After the board rendered a decision, Central Airlines refused to comply; the union filed suit in federal district court to enforce the board's decision. This court found that the controversy did arise under a federal statute, either 28 U.S.C. § 1331 or 28 U.S.C. § 1337, or both.

As Judge Gignoux pointed out, such reliance on *Central Airlines* is "misplaced." *Portland* decision, at 12. This court found federal subject matter jurisdiction in the *Central Airlines* case based on the scope and history of the Railway Labor Act, 45 U.S.C. §§ 151-184. Under that Act, there was a long-time Congressional concern with minimizing labor unrest in the field of interstate commerce and numerous Congressional attempts to "establish machinery to resolve disputes." The history of Congressional concern with labor issues in mass transit is quite the opposite. Intrastate, even intra-city, commerce is involved. Traditional public employee remedies under state law were involved.

Again, the appropriate summary, in the view of Judge Gignoux was:

> The Railway Labor Act, containing as it does a systematic and comprehensive network of provisions regulating the labor relations between interstate rail and air carriers and their employees, differs radically from UMTA. UMTA exists primarily as a mechanism to provide aid to urban mass transit carriers. *See* § 2(b) of the Act, 49 U.S.C. § 1601(b). The express purpose of the Railway Labor Act, on the other hand, is to promote labor peace and to establish procedures for the efficient settlement of labor disputes. *See* § 2 of the Railway Labor Act, 45 U.S.C. § 151(a). It was to this end that the Railway Labor Act created a National Mediation Board and related dispute resolution mechanism. UMTA, however, contains no similar scheme which so directly and comprehensively permeates the labor relations between the parties. *Portland,* No. 77-54-SD at 13.

The next 13(c) case to go to trial was the instant matter. Without independent consideration, Judge Oliver adopted by reference Judge Doyle's jurisdictional findings as directly relevant to the instant case. Indeed, Judge Oliver's ruling that subject matter jurisdiction was present is quite similar to that of Judge Doyle.

On appeal, Judge Henley, speaking for the court in *Divison 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* No. 78-1255 at 7-11 (8th Cir., filed August 21, 1978), relied heavily on Judge Doyle's opinion in affirming, but conceded that the question of "arising under" or federal subject matter jurisdiction is not "free from doubt."

In the sixth 13(c) case, *Division 1160, Amalgamated Transit Union* v. *City of Monroe,* No. 780,587 (W.D. La., May 12, 1978), a trial date has not yet been set.

These eight cases indicate that five District Court judges have found an absence of subject matter jurisdiction [(N.D. Ga.), (W.D. Ky.), (W.D. Tn.), (S.D. Me.), (N.D. N.Y.)] while two have found jurisdiction [(W.D. Mo.), (W.D. Wis.)]. The last, [(W.D. La.)] has yet to speak. Of the three Court of Appeals decisions, two have found jurisdiction [(7th Cir.), (8th Cir.)] while the other [(2nd Cir.)] did not reach the issue. The disparate opinions indicate a serious division of authority which this court should resolve.

QUESTIONS PRESENTED

1. Whether the Congressional intent in enacting the Urban Mass Transportation Act with labor provisions expressly designed not to supersede state law can be interpreted as establishing a federal transit labor law.

2. Whether federal subject matter jurisdiction lies for purposes of validating, interpreting and enforcing a labor agreement between a local public body and a union representing public employees where Congress failed to provide such subject matter jurisdiction and where interpretation of the agreement does not involve interpretation of any federal law.

3. Whether the claim is one upon which relief can be granted even if federal subject matter jurisdicion is found.

4. Whether a federal court should refrain from ordering an agency of the state to violate a statutory duty by delegating its responsibilities to a third person where preemption of state law is contrary to Congressional intent and where the order fails to set standards to guide that person and fails to maintain authority to pass on that decision prior to its effectiveness.

SUMMARY OF ARGUMENT

I. Absence of Federal Subject Matter Jurisdiction

The basis of the action before this Court is the interpretation and enforcement of a contract—a labor agreement. As such, it is properly subject to enforcement in the appropriate state court. Merely because a federal statute mandates the effectuation of arrangements to protect employees, it does not necessarily follow that the enforcement of such arrangements (whether or not reduced to written contract) in the

federal courts is appropriate. In this case, the necessary labor protections mandated by the statute are in place, the protections are quite incidental to the statutory purpose and program, and there is no federal interest in policing the arrangements.

II. The Congress Did Not Intend to Establish a National Transit Labor Law

The labor protections in the Transit Act were enacted for a definite but limited purpose—to protect employees from a worsening of their condition as a result of the federal assistance. Respondent herein did not institute this action because of harm resulting from the federal project.

If the federal courts determine that there is federal jurisdiction to review both the labor protection agreement and also (by Respondent's bootstrapping) the making or maintaining of collective bargaining agreements, then in effect, the federal courts would be reviewing all aspects of transit labor relations.

Had the Congress wanted to place the federal courts in a position of supervising transit labor relations, it could have done so. It provided such authority in other labor relations acts. But the legislative history of the Transit Act gives no support for any such overview. To the contrary, significant portions of that history indicate a very limited Congressional intent in enacting 49 U.S.C. § 1609(c).

III. The Protective Agreement Was Itself *Ultra Vires* and Enforcement Would Constitute Inappropriate Federal Interference With the Authority of the State to Establish Parameters for Its Subdivisions

The Kansas City Area Transit Authority is a bi-state agency, duly established by the Missouri and Kan-

sas legislatures with the approval of the United States Congress. The enabling legislation sets forth the specific powers of the agency. Those powers do not include the ability to delegate to a private arbitrator the power to spend public funds by establishing employee salary and fringe benefit packages. Such power was requested by the union but abandoned during the legislative process as "politically infeasible." If the Authority erred in agreeing to such delegation, it is appropriate to leave enforcement or rejection of the terms of that agreement to the state court.

ABSENCE OF FEDERAL SUBJECT MATTER JURISDICTION

The Court Below Has Decided Substantial Questions in a Manner Inconsistent With Decisions of This Court and Other Federal Courts

The purposes of the Urban Mass Transportation Act and the Congress' view of the national interest are set forth in the Act itself at 49 U.S.C. § 1601(b)[13] and § 1602(a)(2).[14] These purposes relate to the following:

[13] 49 U.S.C. § 1601(b):

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of area-wide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

[14] 49 U.S.C. § 1602(a)(2):

(2) It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. . . .

development of mass transportation, facilities, and equipment; the encouragement of, the planning and establishing of area-wide transportation system(s); financing assistance; etc. Thus, the goals, generally speaking, are to aid localities in the provision of mass transit service.

In order to secure funding available under the Act, localities must undertake and complete a number of preliminary steps including certain transportation planning, relocation assistance to displaced persons, compliance with federal civil rights and environmental protection laws, preparation of certain reports and financial audits, provision for low fares to elderly and handicapped persons, and arrangements to meet the labor standards under which the Respondent brought this action.

The Congressional concern was clearly to provide for better mass transit. Nowhere in the statute or legislative history is there evidence that the Congressional purpose was to pass a transit law for the benefit of employees. The labor protection aspects of the legislation are at most, secondary or incidental. Rather, the protections were afforded to employees who might somehow be harmed as a result of the federal assistance.

Respondent has asserted jurisdiction under 28 U.S.C. § 1331(a)[15] based on a federal law—the Urban Mass

[15] "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." 28 U.S.C. § 1331(a) (October 21, 1976).

Transportation Act of 1964. 49 U.S.C. § 1601 *et seq.* That statute does not, however, by its terms or implication, provide any remedy for violation of contracts between an employer and a labor organization.

In parallel litigation, Respondent union has argued that the Transit Act benefits "discrete interests" as well as providing funds for the general social interest of bettering mass transit. Such a contention is not supported by the statutory language. Section 13(c) was intended as a shield to protect employees from harm arising as a result of the federally assisted project, not as a sword—to benefit discrete interests.[16]

The standards for determining whether a private remedy is implied in a statute, standards which were not considered by the court below, are carefully described in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975):

> First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the Plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? . . . And, finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

[16] The Congressional purpose was to improve public transportation, *supra* p. 20-21, the secondary concern was only to protect existing employee rights, "the rights and privileges which have been already established and preserving their *status quo*" [1964] *U.S. Code Cong. and Ad. News* 2584.

Similarly, in the analogous Second Circuit case, that court held that the legislative history of the Act makes it:

> . . . reasonably clear that Section 13(c) was intended to preserve the rights of employees under existing collective bargaining agreements and to maintain the *status quo* with respect to the employer's obligation to bargain collectively, not to create any new rights for the employees or enhance existing ones. 88 Cong. Rec. 5670-5677 (1963). Division 580, *Amalgamated Transit Union* v. *Central N. Y. Regional Transp. Auth.*, 556 F.2d 659, 662 (2d Cir. 1977).

The first of the criteria set forth in *Cort* is whether the plaintiff is one of the class for whose *especial* benefit the statute was enacted. As in *Cort,* where Justice Brennan took the broad view and looked at the overall purposes of the Act rather than the secondary concern of stockholders, here we know the overall purposes of the Transit Act, for they are set forth with unmistakable clarity in 49 U.S.C. § 1601(b)(3). This is confirmed by the legislative history of the transit Act, for it gives no indication that the Act was intended for the *especial* benefit of employees. The fact that employees were afforded protection from harm arising as a result of the Act hardly suggests that the "primary Congressional goal" (*Cort,* 422 U.S. at 84) was to benefit employees.

In a similar 13(c) case, *Local Division No. 714, ATU* v. *Greater Portland Transit District,* No. 77-54-SD (S.D. Me. 1978), Respondent's sister local union argued that the "especial benefit" test should be narrowly applied. But to accept that proposal would be to read the labor protective provision separately and would be at odds with the statutory language that arrangements be made "to protect the interest of employees *affected by* the federal assistance." (emphasis added.)

Cort further instructs us that for a federal cause of action to be found, there must be evidence of legislative

intent to create the remedy. Neither the language of the statute nor its legislative history indicates such intent.

The third prong of the *Cort* test is whether an implied remedy is consistent with the underlying purpose of the legislative scheme. In contrast to the "scheme" of the Railway Labor Act, 45 U.S.C. § 184 (see p. 26 *infra*), the "scheme" of the transit statute hardly takes organized labor into account. Rather, once it is determined by the Secretary of Labor that employees are protected, the project moves forward. Should employees be harmed, their remedy to enforce the 13(c) agreements in state court is available.[17] And, their alleged claims would rise or fall based on the state court's interpretations of these agreements, for there is no Federal statutory "scheme" relating to transit employees.

The final lesson of *Cort* is that if the "cause of action is one traditionally relegated to state law, in an area basically the concern of the States," it is appropriate to leave the Respondent to its state law remedy. In *Cort*, Justice Brennan noted that state law normally governs the internal affairs of a corporation. The analogy is here exact, for state law normally governs labor relations matters pertaining to public employees.

Since there is no express statutory provision authorizing private actions, the wording of the Act militates against implication of private remedies in that it makes labor protections only a condition precedent to obtain-

[17] *See Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Auth.*, 447 F.Supp. 88, 94-95 (W.D. Tenn. 1977), and *Transit Auth. of Louisville and Jefferson Counties* v. *Amalgamated Transit Union*, No. C-76-0535-L(B) at 2 (W.D. Ky., April 20, 1977).

ing benefits. Nowhere does the Act declare any conduct unlawful. The gap between the statutory language and the remedy that Respondent deems implied is substantial. Section 1609(c) does not declare violation of a 13(c) agreement to be unlawful and does not set forth the basic scheme for enforcement of a private remedy.

In parallel litigation, the Respondent union has taken the position that federal court decisions dealing with the labor protection provisions in the railroad industry are analogous to disputes concerning the interpretation of transit labor protections. That argument leads to the wrong path. Although 49 U.S.C. § 1609(c) does state that the benefits provided shall be no less than those established under Section § 5(2)(f) of the Interstate Commerce Act (49 U.S.C. § 5(2)(f)), that mandate concerns only the benefit level to be afforded and does not imply applicability of the labor protective "scheme" included in the railroad legislation. Moreover, the labor protections under § 5(2)(f) are incorporated in an order of the Interstate Commerce Commission (ICC), and thus, enforcement of the labor protections would be based on enforcement of an ICC order.[18]

[18] 49 U.S.C. § 5(2)(f) reads:

> (f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its *order* of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order,

The Congress expressly granted the federal courts jurisdiction to review such ICC orders in 49 U.S.C. § 9 and § 16(12) and 28 U.S.C. § 1336.

No comparable grant of jurisdiction can be found in the Transit Act, thus the statutes are not analogous.

These analogies to employee protective provisions and case law related to that industry (and the airline industry) were easily disposed of by Judge Gignoux in the *Portland case,* No. 77-54-SD at 16-17. Not only are there differences in the scope and background of the federal acts, but the industries are different. The Railway Labor Act, 45 U.S.C. §§ 151-184 established a complete scheme to resolve labor disputes. Long time Congressional concern over labor unrest in interstate commerce in certain other industries led to the establishment of machinery to resolve disputes through final and binding decisions. Thus, the labor relations approach was a specific portion of the legislation. Included within the ambit of the statute were boards of adjustment which were "concerned" with both major disputes (those related to wages, hours and working conditions), and minor disputes (those concerned with the interpretation and application of existing contracts). Thus, the Railway Labor Act established a systematic and comprehensive network of provisions regulating labor relations between interstate rail and air carriers and their employees—a scope of labor rela-

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than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. (emphasis added.)

tions regulation totally absent in 49 U.S.C. § 1601 *et seq. See Portland,* No. 77-54-SD at 17. Thus, Judge Gignoux gave little credence to Respondent union's argument that the *Machinists* case, 372 U.S. 682, interpreting § 204 of the Railway Labor Act, supported a jurisdictional finding under the Transit Act. *Portland* No. 77-54-SD at 16.

The purposes of the Acts are different—the goal of the Railway Labor Act includes the promotion of labor peace and the establishment of procedures for the efficient settlement of labor disputes, the Urban Mass Transportation Act has no similar purpose, and as outlined, is concerned with providing transit aid and mentions labor only in regard to assuring that specific federal grants not themselves cause harm to employees. *See* p. 31 *infra.*

Similarly, § 405 of the Rail Passenger Service Act of 1970, (which concerned Amtrak) 45 U.S.C. § 565, requires rail carriers that contract with Amtrak to provide employee protections. That Act also has a specific grant of federal jurisdiction in § 307 (45 U.S.C. § 547). Thus, cases cited by Respondent union in prior litigation such as *Arthur* v. *Cincinnati Union Terminal,* No. 8968 (S.D. Ohio, December 29, 1976) (motion to reconsider denied, March 15, 1977), are totally inappropriate. As Judge Gignoux noted, while § 307 is an express grant of jurisdiction ". . . tellingly, there is no such specific grant of jurisdiction to the federal courts contained in UMTA." (*Portland,* No. 77-54-SD at 14-15).

We know that the Congress saw fit to vest jurisdiction in the federal courts for these railroad employees. We know also that the Congress, although it patterned the protections after railroad experience, did not choose

to vest the federal courts with jurisdiction over disputes arising under the Transit Act. This omission is not discussed in the legislative history of the UMTA Act; however, it can be inferred that if the railroad acts were copied for one purpose, that their non-use as a model for a second purpose was deliberate. Perhaps the rationale was the fact that since transit employees are public employees, a mandate of control over the work force would be an encroachment on state sovereignty. *See National League of Cities* v. *Usery,* 426 U.S. 833 (1976). The Congress was willing to require that the Act protect employees from harm arising as a result of the project, but not to go any further.

Under the rationale of *National League of Cities* v. *Usery,* the enforcement of labor contracts should be left to the courts of the 50 states so as to avoid displacement of "the states' abilities to structure employer-employee relationships." *Id.* at 851. Such principles should be particularly applicable to situations such as that before us where federal action would interfere with the relationship of local government to its own employees. And an alternate approach should not be lightly considered as ". . . it is not to be supposed that Congress, in exercising its regulatory authority, intends to shift from the state to the federal courts large bodies of private litigation absent some reasonably reliable evidence that this was its intention." 1 *Moore's Federal Practice* ¶ 0.62 [2.2] (2d ed. 1978).

Reduced to its essentials, the complaint concerns a dispute revolving around the terms of a contract. Plaintiff cannot plead a breach of contract and attempt to invoke federal jurisdiction by a transparent technical exercise in pleading. *See Gully,* 299 U.S. 109.

In *Gully,* a Mississippi official brought suit to collect taxes authorized by an Act of Congress. The taxes were owed by an insolvent bank that defendant had acquired. Mr. Justice Cardozo pointed out that neither side in the litigation questioned the Act of Congress or its applicability. But rather, that the dispute concerned whether the defendant was liable under the contract of acquisition and thus, the matter should be left to the Mississippi state courts. The case before us is perfectly analogous. We do not question the fact that 13(c) arrangements are required by federal law.[19] We question, however, whether the *enforcement* of those arrangements is proper in federal court. See p. 12 *supra.*

The aspect of the agreement which this action seeks to enforce (arbitration) is not mandated by federal statute or order. When the parties negotiate a "13(c) agreement," the Department of Labor's obligation is limited to determining whether or not it can certify that employees have been protected. Thus they either approve, disapprove or suspend action on certification. Given the rule that mere approval by a federal agency is not decisive (*McFadden Express, Inc.* v. *Adley Corp.,* 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied,* 381 U.S. 915 (1966)), federal question jurisdiction does not exist because the agency has simply authorized or approved an agreement made between others.

The federal statute, 49 U.S.C. § 1609(c), does not require arbitration. Indeed, despite the request of or-

[19] It should be noted that nowhere does the Act require a 13(c) agreement. It requires only arrangements (to protect employees). The federal responsibility then, effected through the Department of Labor, is only to determine whether the arrangements are in place.

ganized labor, the Congress explicitly rejected inclusion of mandatory arbitration.[20]

The *McFadden* rule sets up a barrier to accepting jurisdiction as the Department of Labor merely certifies an agreement between the parties. Neither that agency nor any statute mandates that compulsory arbitration provisions be included in any agreement or that public bodies operating transit service be required by law to surrender the authority to establish wages of public employees under their jurisdiction.

THE CONGRESS DID NOT INTEND TO ESTABLISH THE NATIONAL TRANSIT LABOR LAW CREATED BY THE COURT BELOW

Following World War II, the urban mass transit industry suffered a decline in ridership that was exacerbated by a concomitant reluctance of the transit enter-

[20] Prior to the enactment of the Urban Mass Transportation Act, representatives of the AFL-CIO and this union as a "constituent member" of the AFL-CIO sought inclusion of a mandatory arbitration provision for the resolution of disputes between local unions and local transit entities. However, the suggested provision was not included and then Secretary of Labor, Willard Wirtz, specifically testified that the proposed legislation would not be a step toward compulsory arbitration.

Hearings entitled Urban Mass Transportation Act of 1963 on S. 6 and S. 917, before a Subcommittee of the Committee on Banking and Currency, United States Senate, 88th Congress, 1st Session 308, 365; Hearings entitled Urban Mass Transportation Act of 1963 on H.R. 3881, Before the Committee on Banking and Currency, House of Representatives, 88th Congress, 1st Session 480-81, 495. *See also* hearings entitled Urban Mass Transportation Act of 1962 on H.R. 11158, before Subcommittee No. 3, Committee on Banking and Currency, House of Representatives, 87th Congress, Second Session (1962), 423-24.

Even an advocate of the labor protective provision, Senator Morse, made it clear that although "organized labor wanted more than the Morse amendment . . . [all they would secure is that] . . . if you have collective bargaining now, . . . [it will be continued]." 109 Cong. Rec. 5672 (1963).

prises to purchase new equipment or otherwise invest in maintenance, management training, marketing, etc. As a result, the Congress found that there was a need to help provide for "the satisfactory movement of people and goods" and that "Federal financial assistance for the development of efficient and coordinated mass transportation systems [was] essential to the solution of these problems." 49 U.S.C. § 1601(a)(2)(3).

The purposes of the Act were very specifically enumerated in 49 U.S.C. § 1601(b)(1)-(3); and, a reading of the entire Act does not reveal the creation of a body of national transit labor law or control by mandatory interest arbitration of the resolution of labor disputes between public transit operators and their employees.

Only § 13 of the Act (49 U.S.C. § 1609) addresses labor relations, and that section provides only for payment of prevailing wages (for certain work) and for the labor protections described in subsection (c). Moreover, the Act does not supplement the labor protections with a grant of jurisdiction to the federal courts to enforce the enumerated protections.

Since its passage in 1964, the Urban Mass Transportation Act has been amended several times, and at no time has Congress altered the management-employee relationship by enacting a national transit labor law. Nevertheless, the decision below could achieve that result for, if the interpretation of complex labor protective agreements is a matter for federal courts to review (and since virtually all transit systems accept federal aid), all transit systems will undertake labor protective agreements which would then be enforceable by the fed-

eral courts.[21] The flurry of 13(c) litigation indicates the impact of this decision. The federal courts would, under the rationale below, hear many transit labor cases which cumulatively could both affect the court system and undermine the intent of the Transit Act by diverting energy and resources to individuals not entitled to transit benefits.

Not only is that prospect antagonistic to the statutory language, but it flies in the face of the legislative history. In Congressional hearings in 1963, Senator Morse stated that the labor provisions would not supersede state law and that state law would control the outcome of disputes arising between employees and grant recipients. 109 *Cong. Rec.* 5347-48, 5359 (1963). This same view was offered by Senator Tower, 109 *Cong. Rec.* 5350 (1963), Senator Williams, 109 *Cong. Rec.* 5417, 5421 (1963), and was confirmed by Secretary of Labor Wirtz, *Senate Hearings, supra* note 20, at 312-13 (1963).

In the Congressional colloquy, the intent to preserve the balance between federal and state concerns is clear. Where as here, the employees in question are employees of local public bodies, the rule must be that "Congress may not exercise that power so as to force directly upon the states those choices as to how essential decisions regarding the conduct of intergovernmental functions are to be made." *National League of Cities* v. *Usery,* 426 U.S. at 855. In that same opinion this Court said: "One undoubted attribute of state sov-

[21] "This court is persuaded that Congress is the appropriate body to determine clearly whether it is national policy for federal courts to become involved in local labor disputes which happen to be within an urban transit area. Congress has not indicated such a policy in UMTA." *Jackson,* 447 F.Supp. at 93.

ereignty . . . is the states' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions . . ." *Id.* Thus, although the Congress enacted the Transit Act prior to the *National League of Cities* case, it anticipated the Court's view that it should not interfere with "the states' abilities to structure employer-employee relationships" or of "the states' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 851.

Despite the fact that federal policy is in favor of arbitration as a grievance dispute resolution mechanism (*Division 1287,* No. 78-1255 at 16), the conclusion does not necessarily follow that since "that policy would be particularly applicable in the vital area of urban mass transit where strikes of workers are in the highest degree undesirable from the standpoint of the public" (*Id.*), the policy is properly enforceable in the federal courts. The Eighth Circuit erroneously concluded that the "obligation to arbitrate is binding on the agency, regardless of general state law or policy" *Id.* at 17. Congress not only did not occupy the field or preempt state power in 49 U.S.C. § 1601 *et seq.,* but as has been stated above, specifically chose not to do so despite the entreaties of organized labor and repeated chances to do so as the Transit Act was amended. See p. 32 *supra.* Rather, the Act is quite consonant with its history that "specific conditions for worker protection will normally be the product of local bargaining and negotiation." [1964] *U.S. Code Cong. and Ad News* 2584-85.

Unlike the broad preemptions of state law effectuated by federal statutes such as the National Labor Relations Act, 29 U.S.C. § 151; the Labor-Management

Relations Act, 29 U.S.C. § 141; and the Railway Labor Act, 45 U.S.C. § 151, the Transit Act fails to take jurisdiction of publicly owned transit labor relations disputes from the state courts, and it remains fully compatible with state impasse resolution procedures—procedures which worked in the parallel *Division 580* case and resulted in the Second Circuit opinion dismissing the 13(c) action as moot.

Had Congress intended to allow actions "for violation of contracts between an employee and a labor organization . . . [to] be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties," 29 U.S.C. § 185, it could have done so by repeating the language of that Act (the National Labor Relations Act) in the Transit Act. It did not. This court should not lightly consider varying the principle that it is the function of a state to determine the legal consequences which should attach to a contract of employment made by local governmental units. Inference that a federal transit labor law was created by the Urban Mass Transportation Act is unsound.

It is submitted that state court review and enforcement of these labor agreements will not interfere with the purposes of the Act or intrude into an area of primary federal concern.

CONTRARY TO CONGRESSIONAL INTENT AND CONTRACT PROVISIONS PROVIDING THAT LOCAL LAW SHALL CONTROL, THE FEDERAL COURT BELOW HAS FOISTED ON LOCAL GOVERNMENTS A REQUIREMENT THAT THEY NOT CONTEST POSSIBLE VIOLATION OF THEIR STATUTORY AUTHORITY

As local governments have assumed greater responsibilities to provide for citizen needs, there has been a significant increase in the number of local public sector employees.[22] Similarly, as private transit operators encountered financial difficulties, most transit operations came to be operated by public entities.[23] Some consented to interest arbitration in their 13(c) agreements, others did not. Many who accepted interest arbitration provisions did so because they were advised that other transit systems had so agreed or because they believed their grant application would not be acted on until they agreed. (*See* note 2 *supra* at 3).

The evolution of 13(c) agreements is described in several Department of Transportation and Depart-

[22] The number of state and local government employees as a percentage of the total U.S. work force has increased from 6.16% in 1952 to 12.76% in 1975. McGrath, *Public Employment in the United States: A Compilation of Statistical Trends* 18, Congressional Research Service Pub. No. 77-154G, Library of Congress.

[23] In 1950, there were 1380 private transit companies, in 1975 there were 614. Comptroller General of the United States, *Private Companies Should Receive More Consideration in Federal Mass Transit Programs* Rept. No. B-169491 (December 10, 1976). *See also* G. Hilton, *Federal Transit Subsidies* 52-53, American Enterprise Inst. Publication (1974), who states at 53, "In general, conversion of city transit to public ownership was . . . a desperation measure to perpetuate a system which could no longer be operated privately." Hilton further concluded that "the conclusion [is] that conversion to public ownership increases wage rates." *Id.* at 55.

ment of Labor studies.[24] In the early years of the Federal transit program, grants were issued upon management's warranty that employees would not be harmed, but that if harm did occur, management would make them whole.[25] A second stage (1965-1968) was the coordinated negotiation of agreements, some three pages in length, which basically reiterated the five protections in 49 U.S.C. § 1609(c).[26] The next evolution in benefit level occurred in 1971, when Secretary of Labor Hodgson mandated the Amtrak labor protective provisions for certain railroad projects. The transit unions interpreted the agreement as the level of benefits under § 5(2)(f) of the Interstate Commerce Act and refused to sign transit 13(c) agreements unless they contained benefits of a similar nature.[27] Each agreement signed by a transit system was offered by organized labor to the next transit system as reflecting that which they had to sign.[28] The transit systems had no choice and the

[24] J. Stern *et al.*, *Labor Relations in Urban Transit*, ch. IV, U.S. Dep't. of Trans.; Rept. No. I WI-11-0004 (1978); Dep't. of Labor, *The Economic Cost Impact of the Labor Protection Provision of Section 13(c) of the Urban Mass Transportation Act of 1964*, 27-30 (1978).

[25] *Id.* at 27. And *see* 1965 Cleveland Transit System-Amalgamated Transit Union 13(c) agreement.

[26] *Id.* at 27-30 and Stern, *et al.*, *supra*.

[27] *Id.* at 29. And *see* R. Leib, *A Review of the Federal Role in Transportation Labor Protection*, 45 ICC Practitioners Journal 333, 336, 339 (1978).

[28] The process of obtaining DOL 13(c) certification itself leads to a uniformity in protective provisions. The guidelines employed by the Department of Labor for processing 13(c) certification applications and the referral procedure described in the introduction thereto provide that the DOL will refer applications to the International Union that represents the affected employees, 43 *Fed. Reg.* 13,558 at 13,560 (1977), to be codified in 29 C.F.R. § 215.3(b).

In addition, the Constitution and General Laws of the Amalgamated Transit Union (Respondent herein), as amended, 9/26-9/30/77, provide in § 31.2 at 104 that:

> "When Local Unions are seeking written agreements with the Company or with an applicant for Federal assistance under the provisions of §§ 3(e) or 13(c) of the Urban Mass Transportation Act of 1964, said agreements shall be submitted to the I.P. [International President] or his authorized deputy for approval before taking final action."

hundreds of existing "independent" agreements bore a striking resemblance.[29]

Each transit system should have analyzed the arbitration provision for, in many cases, it may be found to be beyond the system's authority. Agencies which themselves had authority to make expenditures of public funds may have lacked the authority to delegate that ability. Indeed, that was the case with respect to the KCATA. The KCATA is a public body, created by bi-state compact, enacted by the Missouri and Kansas legislatures and approved by the United States Congress.[30] That compact does not give the commissioners of the KCATA authority to turn over to a private party (such as an arbitrator) all authority (conceivably in perpetuity) to establish wages and terms of employment for public employees under their jurisdiction. Given the fact that 75% of the KCATA budget is earmarked for salaries and benefits, relinquishing control over that portion of the budget should not be lightly implied.[31] Nowhere in the District Court or Court of

[29] See note 27 *supra*.

[30] P.L. 90-395, 82 Stat. 338.

[31] Neither is it possible to imply such a power into this bi-state compact. Grants of power "must be indicated by express terms or by clear implication." *Jackson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977).

Appeals opinions is there reference to any authority which would authorize the Commissioners to enter into the alleged agreement. Indeed, the statutes reflect no such authority despite the fact that the legislative history clearly indicates that the Union wanted statutory authority for arbitration of new labor contracts, but abandoned the proposal when advised that it would not be feasible to obtain enactment of such legislation.[32]

Missouri and Kansas law will not lightly permit bodies to contract away or delegate their statutory duties and responsibilities; and the rule of construction of statutory grants of power is generally stated with realistic caution. *Landau v. City of Leawood,* 214 Kan. 104, 519 P.2d 676 (1974); *Carp* v. *Board of County Commissioners,* 190 Kan. 177, 373 P.2d 153, 155 (1962); *Anderson* v. *City of Olivetts,* 518 S.W.2d 34 (Mo. 1975); *State ex. rel. Cities* v. *West,* 509 S.W.2d 482 (Mo. App. 1974); *Clay* v. *City of St. Louis,* 495 S.W.2d 672 (Mo. App. 1973) (unlawful delegation to a public commission of authority to set fees for airport use).

The obligations of the KCATA commissioners are clearly described in the enabling legislation. They include the power to "fix" salaries and wages of (KCATA's) officers and employees.[33] The 1967 amendments to the statutes specifically allowed collective bargaining with unions "concerning wages, salaries, hours,

[32] *See* District Court Finding of Fact #18 concerning a proposed Amalgamated Transit Union March 16, 1976 letter of ATU general counsel, Earle W. Putnam, to William Icenogle, Esq., counsel to the transit system and Lewis Copple, President of ATU Local 1287, requesting that the pending bi-state legislation include among other things, a binding arbitration provision.

[33] Kan. Stat. Ann. § 12-2534 Mo. Rev. Stat. § 238.010.

working conditions, pension or retirement provisions, and insurance benefits," and also authorized written contracts specifying agreed terms of employment.[34] But these provisions fail to authorize arbitration of new contracts and fail to authorize the Commissioners to delegate the authority to establish terms of employment. The scope of the Commissioners' authority is thus explicit.

The Missouri Supreme Court has faced the issue and has determined that only "advisory" assistance may be used by public employees in determining employment conditions. *Peters* v. *Board of Education of Reorganized School District No. 5,* 506 S.W. 2d 429, 433 (Mo. 1974). The Kansas courts have not directly faced this question, but have referred favorably to a similar holding. See *West Hartford Education Association, Inc.* v. *De Courcy,* 162 Conn. 566, 295 A.2d 526, 533 (1972) cited in *National Educational Association of Shawnee Mission* v. *Board of Education,* 212 Kan. 741, 512 P.2d 426, (1973).

We are aware of no instance where arbitration has been "read into" a statute governing the authority of public officials. Indeed, where as here, the authority of the officials is clearly set forth in a bi-state compact, such authority by implication seems particularly inappropriate.

APTA represents public transit systems in some forty states including many where delegation of public contracting rights could under existing case law be considered an unlawful delegation of statutory duties.

[34] *Id.,* This bi-state compact was approved by Congress on July 11, 1968, H.J. Res. IIII, 90th Cong., 1st Sess., Pub. L. 90-395, 82 Stat. 338 (1968).

The states where delegation to arbitrators (such as that sought by Respondent) would be improper, would include:

Missouri *(Anderson, supra);* Kansas *(Landau, supra);* Colorado *(Greeley Police Union* v. *City Council of Greeley,* 553 P.2d 790 (Colo. 1976)); Maryland *(Maryland Classified Employees Ass'n, Inc.* v. *Anderson,* 380 A.2d 1032 (Md., 1977)); Ohio *(Trotwood Madison Classroom Teachers Ass'n* v. *Trotwood Madison City School District Board of Education,* 52 Ohio App. 2d 39, 367 N.E.2d 1233 (1977); Utah (*Salt Lake City* v. *I.A. of Firefighters,* 563 P.2d 786 (Utah 1977)); California *(San Francisco Firefighters* v. *City and County of San Francisco,* 68 Cal. App. 3d 896, 137 Cal. Rptr. 607 (1977)).

Where there are no standards to guide the arbitrator, no procedural safeguards, and where arbitrators are not accountable, many other state courts have held that delegation of authority to set wages to an arbitrator is unlawful.

CONCLUSION

For the reasons set forth herein, APTA respectfully requests that this Court grant certiorari, reverse the judgments of the lower courts, and enter judgment in favor of the Petitioner.

Respectfully submitted,

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